

**BEFORE THE OFFICE OF ADMINISTRATIVE HEARINGS  
STATE OF OREGON  
FOR THE  
OREGON WATER RESOURCES DEPARTMENT**

In the Matter of Water Right	)	OAH No. WR-10-003
Application S-87330 in the name of	)	OWRD No. S-87330
Willamette Water Co.	)	
<i>Applicant and Protestant,</i>	)	<b>PROPOSED ORDER</b>
	)	
WaterWatch of Oregon, Inc.	)	
<i>Protestant.</i>	)	

**HISTORY OF THE CASE**

On November 5, 2008, Willamette Water Co. (the Company) submitted application No. S-87330 (the Application) to the Oregon Water Resources Department (the Department or OWRD) for a permit to use 34.0 cubic feet per second (cfs) of water from the McKenzie River for a quasi-municipal use. The Department issued a Proposed Final Order (PFO) on January 26, 2010, that proposed to issue a permit with conditions. The Company and WaterWatch of Oregon (WaterWatch) filed protests of the PFO on March 12, 2010.

The Department referred the protests to the Office of Administrative Hearings (OAH) on April 23, 2010, for a contested case hearing. The case was assigned to Administrative Law Judge (ALJ) James W. Han.

On February 11, 2010, the Eugene Water and Electric Board (EWEB) filed a request for standing in connection with the Application, and filed a Petition to Participate as a Party in the case on June 1, 2010. The Department issued an order allowing EWEB's petition on July 1, 2010. EWEB stipulated to withdraw from the case on November 29, 2010, and the Department entered an order dismissing EWEB from the case on December 2, 2010.

The parties filed a Joint Stipulated List of Issues for Hearing, under OAR 690-310-0180(1) and 690-002-0075, on June 9, 2010. The parties filed Motions for Summary Determination, a Motion to Dismiss WaterWatch Protest, and a Motion to Amend Joint Stipulated List of Issues on December 7, 2010. AJL Han issued rulings on the motions on May 10, 2011.

The Company filed an Amended Motion to Bifurcate Pursuant to OAR 137-003-0525(1)(c) on May 21, 2011. The Department issued an Order on Party Status on June 27, 2011, that provided:

[The Company] is a party to the contested case resolving the protest that [the Company] filed against the PFO for Application S-87330. [The Company] is also a party to the contested case resolving the protest that WaterWatch filed against

the PFO for Application S-87330.

WaterWatch is a party to the contested case resolving the protest that WaterWatch filed against the PFO for Application S-87330. WaterWatch is not a party to the contested case resolving the protest that [the Company] filed against the PFO for Application S-87330.

Based on the Department's Order on Party Status, ALJ Han issued a Ruling on Amended Motion to Bifurcate on July 26, 2010, that bifurcated the proceeding into two contested cases, as follows:

Case No. WR-10-003 will concern WaterWatch's protest of the PFO for Application S-87330. The parties to the case are WaterWatch and [the Company]. The hearing of the case will proceed first, before the hearing of the second case.

Case No. WR-11-010 will concern [the Company's] protest of the PFO for Application S-87330. The only party to the case will be [the Company]. The hearing of the case will be held after OAH issues a proposed and final order in Case No. WR-10-003.

In accordance with the parties agreement at a telephone prehearing conference on August 25, 2011, the parties and the Department on October 24, 2011, filed with OAH and exchanged witness affidavits, hearing exhibits, and lists of exhibits and witnesses. On November 3, 2011, the parties and the Department filed with OAH and exchanged lists of rebuttal witnesses and rebuttal exhibits. The Department mailed a Notice of Hearing on October 25, 2011.

The hearing was held on November 14 through 16, 2011, in Salem, Oregon, with ALJ Han presiding. Attorneys Reed Marbut and Larry Gildea appeared for the Company. Attorneys Lisa Brown and Brad Hill appeared for WaterWatch. Senior Assistant Attorney General Renee Moulun appeared for the Department.

The following persons submitted affidavits and testified as witnesses for the Company: The Company's principal member Jeff Demers, civil engineer Shane Hughes, hydrogeologist Steven Recca, civil engineer Richard Nichols, and land use attorney William Kloos.

The following persons submitted affidavits and testified as witnesses for WaterWatch: civil engineer John Davis and land use attorney Jannett Wilson.

The following persons submitted affidavits and testified as witnesses for the Department: Water Rights Section manager Dwight French and Water Supply and Conservation Specialist William Fujii.

The record was left open until February 3, 2012, for submission of written closing arguments. The record closed on that date.

## ISSUES

(1) Whether the public interest presumption under ORS 537.153(2) was overcome because one or more criteria for establishing the presumption were not satisfied. ORS 537.153(2)(a); OAR 690-310-0110(1).

(2) Whether the proposed use will impair or be detrimental to the public interest. ORS 537.153(2)(b).

## EVIDENTIARY RULINGS

### *The Company's Affidavits and Exhibits*

The Affidavit of Jeff Demers and Demers Exhibits A, C, G, and J were admitted into the record without objection. Exhibit K, the complete document from which Exhibit J was excerpted, was marked for identification but not admitted. Relevance and hearsay objections to Demers Exhibits B, D, E, F, and H were overruled and the exhibits were admitted. Exhibits I and L were excerpts of larger documents; the complete documents were admitted without objection in place of the excerpts.

The Affidavit of Bill Kloos and Kloos Exhibits A through I were admitted. WaterWatch's relevance objections to Kloos Exhibits E, F, and I were overruled.

The Affidavit of Shane Hughes and Hughes Exhibit A were admitted without objection.

The Affidavit of Steven Recca and Recca Exhibit A were admitted without objection.

The Affidavit of Richard Nichols and Nichols Exhibits A, B, C, D, and E were admitted over WaterWatch's relevance objection.

### *The Department's Affidavits and Exhibits*

The Affidavits of Dwight French and William Fujii were admitted without objection.

OWRD Exhibits A1 through A5 were admitted without objection. A relevance objection to OWRD Exhibit A6 was overruled and the exhibit was admitted.

### *WaterWatch's Affidavits and Exhibits*

The Affidavit of John Davis was admitted, except that the Department's relevance objection to paragraphs 12 and 13 were sustained and those paragraphs were disregarded.

The Affidavits of Janett Wilson and Brian Miyake were admitted without objection.

WaterWatch Exhibits 1 through 12, 15, 19, 23, 24, 26, 27, and 36 were admitted without objection. The Company's and the Department's relevance objections were overruled for

WaterWatch Exhibit 13, 28, 29, and 30 and the exhibits were admitted. WaterWatch Exhibit 40 was admitted over the Department's objection that it was not offered before the hearing. WaterWatch 41 was admitted over relevance and hearsay objections.

WaterWatch offered all of the Company's and the Department's answers to interrogatories and requests for admissions—WaterWatch Exhibits 14, 17, 18—without specifying the relevance of any particular answer or admission. The exhibits were not admitted because WaterWatch did not establish the relevance of the exhibits and because they would be unduly repetitive of testimony presented at the hearing.

A relevance objection to WaterWatch Exhibit 22 was overruled, but the exhibit was not admitted because it was an incomplete document and there was no evidence to establish the authenticity of the document. The Department's relevance objection to WaterWatch Exhibit 25 was sustained and the exhibit was excluded.

## FINDINGS OF FACT

### *The Application*

(1) In 1990, the Department issued Permit No. S-50877 to the Company for quasi-municipal use of 4.0 cfs of water from the McKenzie River. (OWRD Ex. A1 at 9.) The permit's service area is the "greater Goshen area," from Eugene south to just before Creswell. (Test. of Demers.) Under the permit, the Company shares the point of diversion (POD) with EWEB. Although the Company currently delivers about 375 gallons per capita per day, primarily to industrial and commercial users, it has not diverted any water under the permit, because the Company is buying the water from EWEB. In reviewing the Company's Application to extend the development time under the permit, the Department concluded that the Company needed until 2040 to develop the 4 cfs permit. (Test. of Fujii.)

(2) In November 2008, the Company applied to the Department for a second permit (the Application) to divert an additional 34 cfs of water from the McKenzie River to supply an expanded service area around Goshen and Pleasant Hill and to serve the cities of Creswell and Cottage Grove. (OWRD Ex. A1 at 6.) The Application asserted that "all of these areas will have water service deficiencies within a very few years. In addition, much of this area is currently using contaminated ground water. There is current demand for treated surface water to replace this ground water, along with future population growth demand." (OWRD Ex. A1 at 6.)

(3) The Application proposed to pump water year-round from the McKenzie River for quasi-municipal purposes. The McKenzie River, a tributary of the Willamette River, is not within or above a State Scenic Waterway, and is located within the Willamette Basin Program, which allows quasi-municipal use. (OWRD Ex. A1 at 35 to 36.) The water would be transported from five points of diversion to the places of use by iron mainline pipes, storage reservoirs, and distribution laterals, then through service connections to domestic, commercial, and industrial users. The Company does not currently have written authorization or easements permitting access to the lands where the Company proposes to divert, transport, or use the water. (OWRD Ex. A1 at 1 to 5.)

### *The Department's Application Review*

(4) The Department's Water Rights Section Manager French supervises the production of water right review documents and tries to ensure that the Department's policies are consistently applied. (French Aff. at 1.) French met with the Company's representatives in a pre-application conference and met with them and their attorney again after the Application was filed.

(5) The principal caseworker, Jeana Eastman, reviewed the Application and the relevant statutes and rules, discussed the Application with French and her supervisor Tim Wallin, manager of the water rights program. She also referred the Application to Fujii for his review. Eastman also completed an Initial Review checklist. (OWRD Ex. A1 at 25 to 29, 38 to 39, and 41 to 42; test of French.)

(6) To determine whether water may be allocated to the Company, the Department conducted a "water availability analysis" using the Department's water availability report system (WARS) computer program that was created in 1994 and was subjected to scientific review, including peer review. (Test. of French.) WARS uses gauged flow or modeled flow information every month of the year to predict how much live flow would be available if no applications, permits, or certificates were issued. The program then subtracts the consumptive amounts for all the issued permits and any issued in-stream water rights. The program then calculates how much water is available at an 80 percent exceedance standard, which is the amount of unappropriated water in a surface water source eight out of 10 days. (French Aff. at 3 and test. of French.)

(7) The WARS data showed that water is available in the McKenzie River at an 80 percent exceedance level for all 12 months of the year. The Department determined that because water is available for the proposed allocation of 34 cfs, the proposed use would be within the capacity of the resource and allowing the use would be consistent with the Department's policy under OAR 690-410-0700. (OWRD Ex. A1 at 30 to 34; French Aff. at 3.)

(8) After conferring with the region's watermaster, the Department determined the proposed use would not injure other rights. Non-injury to other water rights is rarely a determining factor for surface water applications because the applicant's rights will be junior to all previous water rights in the Willamette drainage. (Test. of French.)

(9) On December 19, 2008, the Department mailed notice of its initial review and determination to the Company, finding the use of 34 cfs from the McKenzie River for year-round quasi-municipal use is allowable. (OWRD Ex. A1 at 384.) On December 28, 2008, the Department published notice of the Application. The Department received no comments from any member of the public within 30 days of the publication. (*Id.* at 311.)

(10) The Department then reviewed the Application under OAR chapter 690, divisions 33 (additional public interest standards with regard to sensitive, threatened, or endangered fish species) and 502 (Willamette Basin Program). The Department also reviewed the Application for compliance with the state water resources policy (chapter 690, division 400) and statewide water resources management rules (chapter 690, division 410). (Test. of French.)

(11) The Department requested the Department of Environmental Quality (DEQ) and the Department of Fish and Wildlife (DFW) to review the Application under OAR chapter 690, division 33. DEQ completed its division 33 review of the Application and noted that “[t]he requested flow (34 cfs) could potentially exacerbate temperature concerns in the lower part of the McKenzie” and “the reduced flow has the potential to impact water quality particularly when flows approach the 7Q10 flow of 1950 cfs.” DEQ recommended inclusion of conditions in the permit to address these concerns. (OWRD Ex. A1 at 46.)

(12) DFW also completed a division 33 review and noted that the proposed use would occur in an area that may affect the essential habitat of sensitive, threatened, and endangered fish species. DFW proposed conditions to mitigate the impact to the essential habitat of these species, including the condition that water may be diverted only when flows in the McKenzie River are at least 2000 cfs at the point of diversion. (OWRD Ex. A1 at 66 to 69.)

(13) Watermaster Michael Mattick also completed a division 33 review. The watermaster recommended the Department approve the Application with unspecified conditions. (OWRD Ex. A1 at 78 to 80.)

(14) The Department considers uses listed in OAR chapter 690, division 300 to be beneficial uses. Because the Application proposed a quasi-municipal use, the Department determined that it proposed a recognized beneficial use under OAR 690-300-0010(40). (French Aff. at 5.)

(15) The Department addresses water efficiency and wasteful use by requiring municipal and quasi-municipal applicants to submit a water management and conservation plan within a specified number of years of permit issuance. (Fujii Aff. at 10.) The plan shows how the applicant is using the water, the applicant’s plan for future water use, and how the applicant is limiting leaks or unaccounted water. The plan helps the Department determine whether the water is being used efficiently and without waste. (Test. of French.) Fujii recommended a condition in the permit requiring the Company to submit a water management and conservation plan within two years of the permit’s issuance. (OWRD Ex. A1 at 39.)

(16) In first reviewing the Application, Fujii noted “[t]here are some serious land use issues related to conflict with land use goals, [related] to [supply] of urban services in rural areas.” (OWRD Ex. A1 at 39.) He was concerned with the lack of land use forms and with the Company’s need to gain access to one of the major points of diversion owned and operated by EWEB under a water right held by the city of Eugene. (Ex. A1 at 39; Test. of Fujii.)

(17) The Department’s December 19, 2008, notice of its initial determination listed additional information required before issuance of a proposed final order and before issuance of a permit. Among other things, the notice stated:

Please provide documentation that demonstrates the proposed use complies with the local acknowledged comprehensive land-use plan *or* documentation from the planning departments that demonstrates you are actively pursuing approval from the cities of Cottage Grove, Creswell, and Springfield, and the Lane County

## Planning Departments.

\* \* \* \* \*

If you demonstrate you are pursuing approval, the Department can continue to process the application and issue a Proposed Final Order and a Final Order even when land use approval has not been obtained. However, before a permit will be issued the Department must receive documentation from the relevant planning jurisdiction that either 1) the proposed use is allowed outright or 2) that an approved land-use decision has been obtained, and that either no administrative appeals were received, or all such appeals have concluded.

(OWRD Ex. A1 at 385.)

(18) The December 19, 2008, notice also included the requirement that “[p]rior to permit issuance, if one is issued, the Department must receive evidence that you have written authorization or easement permitting access to lands not owned by you nor owned by customers to which you will provide water.” (OWRD Ex. A1 at 385.)

(19) In February 2009, the Company submitted land use compatibility statements (LUCS) from Lane County, Springfield, Cottage Grove, and Creswell. The Company informed the Department that the Company “has not yet applied for any discretionary approvals, as that would be premature pending final design of the expanded system.” (OWRD Ex. A1 at 365-366; 367 through 383.)

(20) Lane County’s LUCS stated that special use and other permits would be needed, and “absent more specific and detailed information about the proposed facilities and their specific locations, the county cannot verify that these are the only permits required.” (OWRD Ex. A1 at 379.)

(21) Two of the proposed PODs are within Springfield’s UGB or within the city’s limits. Both PODs are in areas zoned public land or open space. (OWRD Ex. A1 at 376.) Under Springfield’s Development Code, “low impact public facilities” are permitted outright, but “high impact public facilities” are discretionary uses. The Springfield LUCS stated “[i]t is not clear whether the subject facility [at POD 2] would be considered “low impact” or “high impact”; according to Springfield, the determination must be made when the Company submits its plans for the diversion facility. (OWRD Ex. A1 at 376.) POD 4 is an existing POD located inside the city limits on land owned by EWEB. Water conveyance infrastructure is allowed in all zones of the city. (OWRD Ex. A1 at 377.)

(22) The key question in the LUCS statements submitted by Creswell and Cottage Grove was whether the distribution of water through the city for domestic consumption is consistent with the planning code. The proposed water use is compatible because the water will serve uses that are allowed outright under ORS 215.213(1), which allows certain nonfarm uses outright on land zoned exclusively for farm use. (Test. of Kloos.) Creswell’s LUCS stated the use would provide water distributed by the city’s municipal water supply to land inside the UGB.

That use is allowed outright and the LUCS gave no cause for concern about land use compatibility regarding Creswell. (OWRD Ex. A1 at 367 to 368.) Cottage Grove's LUCS also showed that the proposed use is allowed outright inside the UGB. (OWRD Ex. A1 at 369 to 370.)

(23) Despite the Department's notice that the Company must provide documentation showing it was "actively pursuing [land use] approval" from the local jurisdictions, and despite the Company's statement that it had not applied for such approvals, the lack of land use approvals was not a determinative issue for the Department. The Department allows an applicant to show the proposed use is compatible with land use restrictions at the beginning of or during the application process. Alternatively, the Department may issue a permit with a condition that requires the applicant to show land use compatibility before the use begins, thus allowing the land use approval process to move forward. In either case, the Department will not allow water use to begin until all land use approvals have been obtained. (Test. of French.) If it becomes apparent later that access to a proposed point of diversion cannot be obtained, the applicant would have to apply for a different point of diversion. (Test. of Fujii.)

(24) On January 26, 2010, the Department issued the PFO that recommended the issuance of a permit with conditions relating to measurement, recording, and reporting of water use information; minimum flow requirements before diversion; submission of water management and conservation plans; fish screening and by-pass devices; and fish passage requirements. (OWRD Ex. A1 at 310 to 330.) The Department found that water was available for the proposed use at an 80 percent exceedence level; the proposed use is allowed by the Willamette Basin program; the proposed use will not injure other water rights; and the proposed use complies with the Commission's rules. Based on these findings, the Department concluded that the public interest presumption under ORS 537.153(2) had been established and the proposed use subject to condition will not impair or be detrimental to the public interest. (French Aff. at 10.) The Department's draft permit required the Company to submit a water management and conservation plan consistent with OAR chapter 690, division 86 within two years of the permit's issuance. (OWRD Ex. A1 at 328.)

(25) Neither the PFO nor the draft permit attached to it included a condition requiring the Company to obtain land use approvals or to show land use compatibility before the proposed use begins. The draft permit contained only a "standard condition" that "[b]y law, the land use associated with this water use must be in compliance with statewide land-use goals and any local acknowledged land-use plan." (OWRD Ex. A1 at 329.)

(26) Neither the PFO nor the draft permit included a condition that, before the Department would issue a permit, the Company must obtain necessary written authorizations or easements permitting its access to lands the Company or its customers do not own. (OWRD Ex. A1 at 310 to 330.) The Company does not intend to obtain rights of way and agreements necessary to divert and deliver water until after the Department issues a water permit. (Demers Aff. at 8.)

(27) On March 12, 2010, WaterWatch filed a protest of the PFO. (OWRD Ex. A1 at 516 to 521.)



### *The Proposed Service Area*

(28) The Application described the proposed service area (PSA) as the “Goshen area south to Cottage Grove—approximately 75 square miles,” including the communities of Pleasant Hill, Creswell, and Cottage Grove, and unincorporated areas outside of Cottage Grove’s and Creswell’s urban growth boundaries (UGB). (OWRD Ex. A1 at 17 to 24.) The PSA straddles the Interstate 5 corridor and is about 18 miles long and 8 miles wide at the widest point. (Test. of Davis.) Only eight percent of the PSA is within city limits of Cottage Grove and Creswell. Thus, 91.5 percent of the acres that the Company proposes to serve are outside these cities’ limits. (Wilson Aff. at 10; WaterWatch Ex. 7 at 2.)

(29) The PSA can be divided into two service areas. Service area 1 consists of about 28,000 acres including the incorporated City of Creswell. In Creswell, 400.79 acres are zoned for commercial or industrial development. Within the unincorporated part of service area 1, 124.88 acres are zoned for commercial or industrial development. The area includes 2,203 residential addresses within Creswell and 1,213 residential addresses outside Creswell’s UGB. (Hughes Ex. A at 3 and 8.)

(30) Service area 2 consists of about 20,000 acres, including the incorporated City of Cottage Grove. In Cottage Grove, 429.11 acres are zoned for commercial or industrial development. Within the unincorporated part of the service area 2, 521.68 acres are zoned for commercial or industrial development. The area includes 4,154 residential addresses within Cottage Grove and 290 residential addresses outside Cottage Grove’s UGB. (Hughes Ex. A at 3 and 9.)

(31) The total acreage in the PSA zoned for commercial and industrial use is 1,476.46 acres, which are centered primarily along the Interstate 5 corridor. (Hughes Ex. A at 3 and 9; test. of Demers.) The rest of the PSA consists of a mix of land zoned for rural residential, agricultural, and forest uses. The PSA includes 7,740.87 acres of exclusively farm use; 8,780.59 acres of impacted forest; 1,931.39 acres of non-impacted forest; 203.4 acres of non-resource zoning; and 593.16 acres of marginal lands. (Wilson Aff. at 10; WaterWatch Ex. 7 at 2.)

### *Available Water Sources in the PSA*

(32) Most of the surface water sources in the southern Willamette Basin, where the PSA is located, are over-appropriated and do not have water available for further appropriation during high-demand months. (Fujii Aff. at 5.) The reach of the McKenzie River under consideration is one of the few places in the Willamette Valley where water is available for appropriation. (Test. of Fujii.)

(33) The Willamette Basin program that governs the Application is very restrictive. Because the Department is concerned that water from federal reservoirs in the area is not available for non-irrigation uses, the Department has restricted by classification the types of uses that one can apply for in the basin. (Test. of Fujii.) The proposed use is one of the classified uses in the McKenzie subbasin of the Willamette Basin program, under OAR 690-502-0080(1)(e) and 690-502-0010(15). (OWRD Ex. A1 at 35.)

(34) Creswell and Cottage Grove have rights to a total of 37.1 cfs of surface water and ground water, of which they are using only a fraction currently. Each city operates its own water treatment system. (Test. of Demers.)

(35) Cottage Grove has seven surface water rights for a total of 24.83 cfs. Six of the surface water rights divert water from the Row River at Cottage Grove's water treatment plant. (Demers Aff. 9.) During the dry summer months only a fraction of those water rights is truly available. (Test. of Demers.) The city's surface water right to divert 4.5 cfs from the Coast Fork is limited to fire protection use. (Demers Aff. 9.) Three rights, totaling 13.77 cfs, were originally diverted from three small Row River tributaries: Layng Creek, Dinner Creek, and Panther Creek. They are not dependable year-round sources of water. Cottage Grove transferred the points of diversion for these rights to the Row River treatment plant location in 2008. The transfer order limits the city's diversions to the "quantity of water lawfully available at the original points of diversion." (Demers Aff. 9.) The city's Layng Creek Plan in 2002 stated that of the 14 cfs under the water right, only two to three cfs were available during the summer. (Demers Ex. K at 7.) Cottage Grove recently dismantled the connection between the Layng Creek diversion and the city's water treatment plant. (Test. of Fujii.)

(36) Cottage Grove has not expressed any intention of becoming the Company's customer. Cottage Grove's Water System Master Plan (WaterWatch Ex. 4) states the city will continue to expand its own water supply system as needed and the plan says nothing about seeking water from another provider. (Davis Aff.) At present, Cottage Grove "appears comfortable with its water supply picture for the intermediate term (15 to 20 years out)." (WaterWatch Ex. 5.)

(37) Creswell has a water right for six cfs on the Coast Fork of the Willamette River. That right is junior to an instream water right and may be cut back if the Army Corps of Engineers (the Corps) does not release enough water to meet the instream water right. (Fujii Aff. at 6.) During the summer, there is very little water flow in the Coast Fork. (Test. of Demers.) Creswell also has emergency wells and wells in the Garden Lake well field that regularly supply water to its surface water plant. (WaterWatch Ex. 36 at 1 to 5.) Creswell treats ground water with a reverse osmosis system to remove arsenic and other contaminants. It has abandoned its Emerald Valley well field because the well field's arsenic concentrations exceed drinking water standards. (Test. of Nichols.)

(38) Creswell informed the Company that the city may need more water if growth or other events make its present supply inadequate, but it made no commitment to use the Company's water beyond stating the Company would be part of the city's water needs planning process. (WaterWatch Ex. 6; Davis Aff.) Creswell's Water System Master Plan (WaterWatch Ex. 3 at 11 through 20) states the city will continue to expand its own water supply system as needed and says nothing about seeking water from another provider. (Davis Aff.) Creswell completed construction of a new 3.2 million gallon a day water treatment plant in 2009 with room for expansion if needed. (WaterWatch Ex. 13; Davis Aff.)

(39) All the rural communities within the PSA rely on ground water wells as their sole water source. (Test. of Fujii.) The unincorporated areas do not have existing surface or ground

water supplies adequate to serve new industries. (Fujii Aff. at 6.)

(40) Veneta has old exempt wells, many of which were drilled before 1955, when the Department started to regulate ground water. The city's wells produce water poorly and are often at risk of contamination from the commingling of surface water and storm water, and from spills occurring inside garages where the wells are typically located. Moreover, residential water users may be junior to agricultural interests outside the city limits. (Test. of Fujii.)

(41) Lowell has a ground water and a surface water right. Because treating arsenic in its ground water is expensive, Lowell has relied solely on its small treatment plant for filtered water. (Test. of Fujii.)

(42) The Blue River community drilled a replacement well from its dysfunctional existing well. It did not abandon the previous well, which was serving up "bad water." The community is now at risk of having bad water from its existing source. (Test. of Fujii.)

(43) EWEB could be a potential regional supplier, but it has an undeveloped water right that is largely unused at present. Currently, the City of Eugene and EWEB are litigating the issue of whether EWEB may supply water to communities outside Eugene's UGB. EWEB can curtail or cut back the amount of water delivered under its contract with the Company, because of price, drought, breakdowns in the treatment plant, and other circumstances, including the city's concerns about its city charter allowing EWEB to serve other communities. (Test. of Fujii.)

(44) If EWEB were prohibited from distributing water to customers outside Eugene's UGB, the Company could no longer rely on EWEB to supply water for the Company's existing service area. Currently there is no other regional supplier to meet the need. The Department considered the possibility that the Company might become a regional water supplier, using the PODs proposed in the Application and the proposed water right to service the Company's existing service area as well as the PSA. (Test. of Fujii.)

#### *Limitations on Municipal Access to Surface Water*

(45) In 1987, the Department started allocating instream water rights. Instream water rights and federal goals for salmonid restoration and recovery require that specified flows remain instream. (Fujii Aff. at 5.) Flows released from reservoirs to protect fish are protected by the Department's water management and conservation program that restricts the available kinds of water appropriations. (Test. of Fujii.) Instream rights exceed the flows in most streams in the region during February to November. (Test. of Recca.)

(46) If a community has a water right junior to an instream right, the community could have difficulty getting adequate water. A water right certificate or permit (a "paper water right") does not necessarily mean the city can actually use the water. The city may not be able to use any of it if stream flows are insufficient to satisfy instream rights. (Test. of Fujii.)

(47) In 1999, salmonid fish species in the region became listed as threatened or endangered. A biological opinion was released in 2008 that required the Corps and fish agencies to conduct research, monitor, and evaluate instream flows and fish habitat. Compliance with the opinion will require dam modifications, including creating extremely expensive fish bypasses. The cost would be reflected in the price of water sold to municipalities, if stored water ever becomes available for municipal use. (Test. of Fujii.)

(48) Currently, unallocated water released from Dorena Dam flows down the Coast Fork of the Willamette. The released water is live stream flow subject to instream water rights. Dexter Dam on the Middle Fork is a much larger dam and supplies the majority of the flow that Creswell relies on, although Creswell's right is junior to the instream water right at the confluence of the Middle Fork and the Coast Fork. (Test. of Fujii.)

#### *Water Quality Problems in the PSA*

(49) Ground water supplies in the Willamette Basin have been extensively studied for water availability and water quality. (Recca Ex. A. at 1.) As early as 1942 it was generally understood that ground water supplies in the PSA would be problematic. (Recca Ex. A. at 4.) In that year, a study concluded that recent river-deposited materials (alluvium) in the PSA was generally thin and would not sustain large withdrawals of water during the summer. (Recca Ex. A. at 3.) Outside the direct influence of the river and the thin alluvium, the water must come from bedrock that is generally high in arsenic. The concentration of arsenic is high in the PSA, where a significant portion of the available water comes from bedrock. (Test. of Recca.)

(50) The PSA is in an area acknowledged by the Department, the Oregon Department of Land Conservation and Development, and the United States Geological Survey as having a high risk of elevated arsenic in ground water. (Recca Ex. A. at 6 and 9.) The location of poor quality water cannot be determined solely geographically because there is no clear correlation between geology and ground water quality. Although one cannot predict which particular well may have an arsenic problem, the problem exists across the entire area, creating a substantial risk that any particular well in the area may produce water with high arsenic content. (Test. of Recca.)

(51) Many public ground water systems in or near the PSA have some level of contamination. Numerous locations in the area have detectable arsenic levels, and most of them have contamination levels that equal or exceed state and federal drinking water standards. Many sites have detectable levels of nitrate nitrogen. (Nichols Aff. 5c.) The presence of above 0.1 milligrams per liter of nitrate nitrogen indicates either infiltration of water from the drain field or from agricultural operation, bringing other contaminants that could be of serious consequence. (Test. of Nichols.) Many sites have positive hits for total coliform. (Nichols Aff. 5c.)

(52) Sampling data confirm the presence of mercury in surface water, sediment, and fish tissue in the Row River watershed. Water sampling data indicate total recoverable mercury levels in Dorena Lake exceed acceptable levels. The primary source of mercury in the Row River watershed appears to be from historical mining activities in the drainage of tributaries

located upstream of Dorena Lake. (Demers Exs. H and I.)

(53) Although drinking water quality reports for Creswell and Cottage Grove do not report water contamination levels higher than the maximum levels allowed by federal and state law (WaterWatch Exs. 28, 29, and 30), the reports reflect water that has been treated for drinking. It does not reflect contamination levels of untreated water. (Davis Rebuttal Test.)

(54) For municipalities and individual homeowners in the PSA, treating the water for human consumption would be very expensive. (Test. of Recca.) Creswell treats its water through a reverse osmosis water treatment plant that was very expensive to install and is expensive to operate. (Test. of Recca.) It is difficult and costly to treat water to remove arsenic in a home well installation. Therefore, it would be desirable for at least some of these homeowners with high arsenic ground water to tie to a treated water system. (Test. of Recca.)

(55) The high arsenic ground waters are associated with bedrock that yields little water to wells. While wells in low-yield bedrock may be able to provide sufficient water for domestic uses, they are generally incapable of providing sufficient water to irrigate a lawn or garden. (Recca Ex. A. at 6.) Ravin Group, LLC, an owner and operator of several water systems in south Lane County that rely on ground water, has seen decreasing quantity and quality of the water in the area's aquifers over the years. (Demers Ex. D.)

(56) If ground water is depleted, uses otherwise allowed may become impractical to develop as planned, or may become impossible to continue as permitted. If uses currently planned for the area are developed, such as wood products mills or rural residential development at the zoned density, and if those uses are not provided with a piped water service, the increased demand on ground water may cause further depletion of ground water. (Test. of Kloos.)

(57) Because of the hydraulic connection between surface water and ground water, removal of ground water from a well upsets the natural equilibrium, increasing the overall discharge from the aquifer and decreasing the natural discharge to streams. Any additional consumptive use of the ground water resource in the region's sub-basins would affect the already insufficient stream flows. (Recca Ex. A. at 5.) Published scientific and regulatory records show that continued reliance on ground water resources in the PSA will decrease the natural discharge to streams. Both the Coast Fork and Row River are currently below the flows necessary to protect the public uses of those water bodies for 10 to 12 months each year. (Recca Ex. A. at 9.)

#### *Stored Water*

(58) Water stored in federal reservoirs is a potential water source for communities and industrial development in the PSA. Several federal storage projects in the southern Willamette Basin are authorized for multiple purposes including flood control, navigation, irrigation, flow augmentation, and water supply. (Fujii Aff. at 5.)

(59) Currently, none of the water stored in the federal reservoirs can be used for municipal use. (Fujii Aff. at 5; OWRD Ex. A5.) "[T]he primary impediments to the use of stored water have been identified as the limitations in the State of Oregon water rights issued for

the projects, the anticipated pricing formula for the stored water, and the potential necessity of identifying an entity to assume the role of contracting authority.” (OWRD Ex. 2 at 17.) The Department issued a water right certificate for 1.6 million acre feet of water from the 13 federal reservoirs for the Bureau of Reclamation’s use only for agricultural production. None of that water can be sold to municipalities for municipal use. The Bureau does not and cannot issue a contract for municipal purposes under its statutes and the Department cannot issue a secondary right for municipal use because it is not authorized under the certificate for stored water. (Test. of Fujii.)

(60) Even if the Corps could sell water to municipalities, the price would be very expensive. The Corps would have to recover the cost of the reservoir and fish bypass structures at the current price of building them. The cost of water for municipal and industrial use under current federal policy would be approximately \$1500 per acre-foot. This cost would nearly quadruple the current price for municipal water. (OWRD Ex. 2 at 8.) By comparison, EWEB currently charges \$400 per acre-foot to its customers. (OWRD Ex. 2 at 13.) Live stream flow—naturally occurring flow in the streams or the noncontracted releases from a reservoir—is significantly more cost effective for municipalities. (Test. of Fujii.) Further, the Corps—which manages the Willamette Basin Project—has indicated that it cannot efficiently administer a large number of requests for small amounts of municipal and industrial water. An entity would be needed to act as an agent for the entities seeking Corps contracts. No such agency exists. (OWRD Ex. 2 at 8 and 13.)

#### *Assessing Future Water Demand in the PSA*

(61) Portland State University’s study, “Population Forecasts for Lane County, its Cities and Unincorporated Area 2008-2035, Lane County, Oregon, 2009” (PSU Study), projected the follow medium growth rates in the PSA over the next 40 years: negative 0.5 percent per year in unincorporated Lane County; an increase of 0.9 percent per year overall in Lane County; an increase of 3.1 percent per year in Creswell; and an increase of 1.2 percent per year in Cottage Grove. (Hughes Ex. A. at 7; Test. of Wilson.)

(62) Cottage Grove’s population in 2008 was 9,686, Creswell’s was 5,321. (WaterWatch Ex. 2 at 12.) The population of the PSA’s unincorporated area was 6,003. (Davis Aff.) Based on the PSU Study’s projections, the total population in the PSA in 2048 would be 38,882, which is about 20 percent less than the Company’s estimate of 46,972 in support of the Application. (Davis Aff.)

(63) The PSU Study’s conclusion of decreasing population in rural areas of Lane County is not necessarily applicable to the area between Cottage Grove and Eugene. Creswell, in the heart of the PSA, has a large and growing population of young families and Latinos; Cottage Grove enjoys close proximity to employment in the Eugene area; Springfield is looking to extend its UGB south; and Lane County has an initiative to promote intensified industrial use in the Goshen area. (Test. of Demers.)

(64) Currently there is no existing water delivery service to the rural areas, so that rural uses must depend on individual wells. (Test. of Hughes.) One benefit of a community system,

such as the Company proposes to provide, over ground water wells is that it is routinely tested to meet drinking water standards. (Test. of Nichols.) Given the problems with ground water in the area, residents of rural areas are likely to choose treated water over ground water if, and as, treated water becomes available. (Test. of Wilson and Hughes.)

(65) One “conventional method” for estimating future water demand is to project per capita usage rate. The per capita rate is the amount of water coming out of a water provider’s treatment plant divided by the population served. It includes not only water served to homes but also water for businesses, schools, institutions, irrigation, and industry. (Test. of Davis.) Because the per capita amount usually refers to the amount treated, it may not accurately reflect the total amount a city actually diverts. For example, a conventional or membrane filtration treatment plant could use 20 percent of its water to treat the water and discharge about 20 to 25 percent of the water back into the stream as “backwash.” That amount is not typically accounted for in per capita calculations. (Test. of Fujii.)

(66) Demers used the per capita approach to identify the water demand in the entire PSA. He determined that current average per capita demand for water in Lane County is 200 gallons per day. To arrive at the maximum daily demand, he multiplied this amount by a peaking factor, because of the need to have enough water at any particular time to meet the maximum need, not the just average demand. After deducting the available supply, Demers determined that the net amount was more than the 34 cfs the Company has applied for. (Test. of Demers.)

(67) Demers’s calculation doubled-counted the commercial and industrial demand because he included an additional allowance for commercial and industrial usage although the per capita amount already included such usage. Per capita water use in many Oregon communities has declined in recent years and is likely to continue declining because of federal and state conservation requirements and local water conservation programs. (Test. of Davis.)

(68) The Company’s Application for 34 cfs depends heavily on industrial demand. Half of the claimed demand would come from commercial and industrial use outside the UGB. The Company forecast 32.49 cfs of commercial and industrial water demand by multiplying acreage of land zoned for commercial and industrial use (1,476.46 acres) in the PSA by a water demand factor of 10 gallons per minute per acre. (Test. of Davis.)

(69) The water demand factor was derived from industrial water use information provided by the Port of Morrow. (WaterWatch Exs. 9 and 10; Davis Aff.) The Port of Morrow is one of the few sources that separately identify industrial and commercial uses, and the usage data it provided reflects the water demand of high-intensity water uses. (Test. of Hughes.)

(70) The Port of Morrow is located on the Columbia River where much shipping goes into and out of eastern Oregon and Idaho. (Test. of Wilson.) The city attracts high water-usage industries because it has access to water supplies; excellent barge, rail, and road transportation; and a system that high water-using food processors can use to dispose of wastewater by irrigation of farm land. (Davis Aff.) The city obtains its water from five deep wells and has access to water from the City of Boardman’s municipal supply. Well water can be supplied

inexpensively to industry because it requires little or no treatment and the distance from the source to the user is small. (Davis Aff.) In contrast, any untreated water the Company supplies in the PSA must be conveyed several miles to the industrial lands in Creswell and more than 20 miles to the industrial lands in Cottage Grove. The cost of this water would be higher than the cost of water at the Port of Morrow and therefore less attractive to industry. (Davis Aff.)

(71) On the other hand, the PSA also has access to rail lines, is situated on the Interstate 5 corridor, is closer to population centers than the Port of Morrow, and has access to natural gas sources. (Test. of Davis and Hughes.) Much of the PSA is zoned for applications similar to those at the Port of Morrow. (Test. of Demers.) Annual commercial and industrial demand is stable and growing slowly in the PSA. The PSA has an array of industrial lands and developed industrial buildings close to transportation sectors. There is a good supply of trained workers in the PSA. Although the Port of Morrow has a stronger relationship with “big agriculture,” the Willamette Valley has much sustainable and organic agriculture. (Test. of Fujii.)

(72) In estimating demand for purposes of building a water system, “conventional engineering practice,” as WaterWatch’s expert witness Davis understands it, does not predict industrial or commercial demand in 15 years or longer because “to build capacity for that immediately when you aren’t actually sure whether it’s ever going to happen is not usually feasible for municipalities or water purveyors. So they don’t do it. And, you know, if an industry shows up later, they may be able to accommodate it or not.” (Test. of Davis. Tr. 11/14/11 at 22 through 23.) A city water system or a water purveyor could not afford to add extra size facilities to provide backup to a neighboring city. Further, “conventional engineering practice” does not include planning to supply back up water because it is hard to fund expensive infrastructure unless there are assured users. Therefore, water demand is based on the number of “primary assured users”—people who will use the water every day and will pay monthly bills to support the cost of the system. Accordingly, in estimating demand in the PSA, Davis did not include an allowance for backups for municipalities and did not include how much water a municipality may require either through an “intertie” with other municipalities or an alternate source. Moreover, “standard engineering practice,” in Davis’s view, is to make assumptions that lie in the middle range of future possibilities. (Test. of Davis.)

(73) The per capita approach is the simplest method of estimating future need for water and “is more readily applicable to suppliers whose customer base is homogeneous (e.g., dominated by residential users of a similar lot-size and economic standing).” (Demers Ex. L at section 3.6.2.) It is also most relevant for considering the design of a water delivery system’s treatment capacity, where the concern is to avoid overbuilding or underbuilding the system’s infrastructure. (Test. of Davis.) The method is not the most appropriate in forecasting water demand in a large region decades in the future, involving possible demand for treated and untreated water for a wide mix of uses, many of which are yet to be developed and the necessary infrastructure has yet to be determined. For that purpose, using low end or mid-range estimates based on per capita data are inappropriate. (Test. of Hughes.)

(74) Hughes prepared a “Water Demand Analysis for Willamette Water Company, Lane County, Oregon,” for the PSA, including the rural areas surrounding Creswell and Cottage



Grove. "Water demand" as used in his report means the reasonable maximum daily demand (MDD) of water extraction that would be required to provide quasi-municipal water service to the customer base within the PSA, including demand to serve future growth. (Hughes Ex. A. at i.)

(75) Hughes looked at the total demand of the area as an independent tracker rather than as a design engineer. He looked at the Company as a potential purveyor of emergency water supplies and at what the peak might be as opposed to what a water company might be able to sell as a market analysis. Hughes's projection assumed that water uses on all the acres would be fully developed in 40 years. (Test. of Hughes.)

(76) The analysis considered demographic data from LCOG; actual demand rates for existing residential uses within the PSA as well as existing residential uses within Creswell and Cottage Grove; and actual water use by industrial and commercial users in the Port of Morrow. Population growth projections were based on the PSU population forecast study. (Hughes Ex. A. at i.)

(77) Hughes assumed the customer base included rural residential users, industrial and commercial users, and emergency water supply use by Creswell and Cottage Grove municipalities. (Hughes Ex. A. at i.)

(78) Hughes assumed that in the unincorporated areas of the PSA the Company would provide service to 12 dwellings per year or one percent per year of the currently un-serviced 1,213 dwellings in Service Area 1 around Creswell. The Raven Group LLC owns and operates a water system in this area and expressed an interest in connecting to the Company's system so potential connections in the area may be greater than the assumed one percent per year. (Hughes Ex. A. at 7.)

(79) The analysis summarized the water demand rates for a 40-year planning period because "for purposes of a water right application for quasi-municipal use, a planning period of less than 40 years would be imprudent." Hughes projected the total 40-year water demand for the PSA to be 42.87 cfs.; that "a water supply of 43 cfs is necessary to service the proposed \* \* \* service area for a 40-year planning period. (Hughes Ex. A. at i.)

#### *Service Area 1*

(80) Hughes projected the 40-year water demand for Service Area 1 surrounding Creswell to be 17.64 cfs, which consists of 0.97 cfs demand for rural residential uses, 4.18 cfs demand for rural commercial and industrial uses, and 12.49 cfs emergency supply use by the City of Creswell. (Hughes Ex. A. at i.)

(81) For rural residential demand, assuming the Company provides service to 12 of these sites per year, the Company can expect to provide service to 60 users (0.12 cfs) within 5 years; 240 users (0.48 cfs) within 20 years; and 480 users (0.97 cfs) within 40 years. (Hughes Ex. A. at 8.)

(82) For commercial-industrial demand, commercial and industrial MDD would be 4.18 cfs (0.0334 cfs per acre), based on 125 acres zoned for these uses outside Creswell's incorporated area. (Hughes Ex. A at 8.)

(83) Creswell's current population is 5,031 and its water use is 3.68 cfs. Hughes projected the following increases in Creswell's water demand:

5 years	5,861 residents	4.29 cfs
20 years	9,265 residents	6.78 cfs
40 years	17,061 residents	12.49 cfs

(Hughes Ex. A at 8.)

#### *Service Area 2*

(84) Hughes projected the 40-year water demand for Service Area 2 surrounding Cottage Grove to be 25.23 cfs, which consists of 0.24 cfs demand for rural residential uses, 17.43 cfs demand for rural commercial and industrial uses, and 7.56 cfs emergency supply use by the City of Cottage Grove. (Hughes Ex. A. at i.)

(85) Service Area 2 includes 290 residential addresses outside Cottage Grove's UGB. Assuming the Company provides service to three of these sites per year, the Company can expect to provide service to 15 users (0.03 cfs) within 5 years; 60 users (0.12 cfs) within 20 years; and 120 users (0.24 cfs) within 40 years.

(86) For rural commercial-industrial demand, commercial and industrial MDD would be 17.43 cfs (0.0334 cfs per acre), based on 522 acres zoned for these uses outside Cottage Grove's incorporated area. (Hughes Ex. A at 9.)

(87) Cottage Grove's current population is 9,686 and its water use is 3.68 cfs. Hughes projected the following increases in Cottage Grove's water demand:

5 years	10,281 residents	4.98 cfs
20 years	12,296 residents	5.96 cfs
40 years	15,609 residents	7.56 cfs

(Hughes Ex. A at 9.)

(88) Rural residential users within Service Area 2 around Cottage Grove are sparsely located and not in close proximity to the Company's distribution system. Hughes assumed a one percent per year growth in demand for the Company's water to serve the 290 currently unserved dwelling in this area. (Hughes Ex. A. at 7.)

(89) The one percent per year projection is a modest increase in serving residential customers within these service areas, based mainly on the increased access due to system expansion and the known water quality and quantity issues that some of these residential sites experience. "[E]ven if the population does not increase within the rural service area, if the water

supply were to be available many of these residential users would opt to connect in order to obtain a safe and reliable water supply.” (Hughes Ex. A. at 7.)

(90) For large applications of municipal or quasi-municipal water, the Department does not use any particular formula to determine whether the amount of water requested is reasonable. Rather, the Department considers that assessing this type of need is a weighing and balancing process, more qualitative than quantitative. The Department determines whether the amount requested is reasonable “using its experience, expertise, and professional judgment” in addition to considering population data, per capita use information, and other information regarding typical municipal uses. Municipalities typically have 20 to 50 year plans and will use engineering data, growth statistics, and other information to determine what expected demands will be. The Department considers that a private water company that will be using water for quasi-municipal uses can have similar demands and planning time horizons. (French Aff. at 7.)

(91) Cities often have a larger water right than they will actually use on any particular day. It is not unusual for a city the size of Eugene to hold a water right for more than 200 cfs. Eugene, Salem, and Portland all have water rights from different sources, rights the Department encourages so there are adequate supplies through primary sources and backup sources. For quasi-municipal suppliers who will supply similar uses, the Department will consider applications for more than the current demand estimate shows to be ready, to serve uses that might come along in the future. (Test. of French.)

(92) Many cities would like to be regional suppliers with interconnections to wholesale customers. Municipalities commonly anticipate providing water to other municipalities when they do their own water demand forecast. (Test. of Fujii.) Some communities view their extraordinary water sources or significantly lower treatment costs as opportunities to develop their own sources and treatment systems and financially benefit their citizens by selling water or providing services to an adjacent community. (Test. of Hughes.)

(93) Municipal uses require primary and backup water supplies. The primary supply is used every day, all year round. A backup system is also needed as an immediately-available supply source in the event the primary system fails. If the primary supply failed without a backup supply, users may not be able to get their full quantity of water for residential, commercial, and industrial purposes; to maintain storage elevation for fire prevention; or to have adequate supplies for irrigation or other agricultural uses. In a catastrophic failure, water may not be available for basic health and sanitation. In such circumstances, municipalities could need enough water to fill their tanks and reservoirs all at once and may need a day’s supply immediately. (Fujii Aff. at 7.)

(94) The Water Management and Conservation Plan Guidebook, published in association with the Department, provides that “redundancy and backup supply needs will be important when forecasting future water needs.” (Demers Ex. L at 43.) In the southern Willamette Basin, there are so many limitations on primary sources that backup supplies should be made available. At the present time, there is no adequate backup source in the PSA to meet a catastrophic failure of primary supplies. The two dams above Creswell and Cottage Grove pose risks of such catastrophic failure for the cities because of their age and condition. Dorena Dam is a 60 year old earth-and-fill dam which is likely to fail or need repair in the near future. (Test. of

Fujii.)

(95) In 1992, the Commission adopted the policy statements embodied in OAR 690-005-0020, which the Department interprets as requiring it to encourage regional water supply planning and water demand management. The Department also interprets ORS 545.010 as encouraging regional water planning. (Test. of Fujii.) The Department suspects that most areas of the Willamette Valley do not have reliable water supplies, and it recognizes the need for coordinated region-wide planning and management of the use of Oregon's water resources. (Fujii Aff. at 6; and test of Fujii.)

(96) The Department has been concerned for many years about the limitations of existing ground water and surface water supplies in the Willamette Valley. It participated in several studies of the area's water supply, including the Southern Willamette Valley Municipal Water Providers (SWMWP) study and report, which discusses water supply needs and impediments to municipalities' access to water stored in federal reservoirs; and the Willamette Reservoir Study, a multi-year, multi-dimensional joint study with the Corps and other entities "to identify ways to balance competing demands and help meet future water needs" in the Willamette Valley. (Test. of Fujii; OWRD Exs. A2 and A6 at 1.) In 2008, the Department awarded grants to communities taking a regional approach to meeting their current and future water needs. (OWRD Ex. A2; Fujii Aff. at 3.)

(97) The Department does not view its role as "prescriptive"; it does not tell a community it must develop a water supply. Because the local people must pay for the water, selection and development of water sources is a local decision. It is up to the local jurisdictions to collaborate and have agreements with each other. The Department is not privy to what the cities are planning for their water supplies, and communities are often secretive about their plans because business arrangements involving water services may be politically controversial. (Test. of Fujii.)

(98) The Department views its role as making many options available for municipalities and other users to meet their water supply needs. The Department encourages regional water supply planning and management by granting to appropriate applicants permits for wide distribution of water and through requiring water providers to submit water management and conservation plans. (Test. of French and Fujii.)

#### *The Department's Assessment of the Amount Requested*

(99) To determine whether an application has requested a reasonable amount of water for the proposed use, the Department usually refers municipal or quasi-municipal use applications to Fujii, who has extensive experience working with quasi-municipal and municipal water providers in Oregon and has reviewed many water management and conservation plans for these types of water providers. (French Aff. at 9.) Fujii has worked for the Department since 1989 and currently is its water supply and conservation coordinator. He helped administer the SWMWP grant, prepared information contained in the SWMWP Final Report, and assisted the SWMWP to plan to develop a regional water supply system. (OWRD Ex. A2; Fujii Aff. at 3.) He is also the manager of the Willamette Basin Reservoir Study. (Test. of Fujii.) On December

17, 2008, Eastman referred to Fujii the question whether the Application requested a reasonable amount of water. (OWRD Ex. A1 at 38.)

(100) Fujii reviewed the Application both before and after the Company supplied the land use information he requested and before the Department issued its PFO. Neither Fujii nor the Department wrote out an analysis of their assessment of the requested amount when reviewing the Application and did not estimate or project specific amounts of water needed within the PSA. (Test. of Fujii.). Fuji's December 17, 2008, email and Fuji's affidavits were the only documentation of the analysis. The email stated nothing about water demand and his affidavits included no numerical analysis of demand for 34 cfs. (Test. of Davis.)

(101) Because the Company's Application proposed to be a regional water supplier, Fujii and the Department considered the Application in the context of the Company providing both primary and backup water supplies to communities both within and adjacent to the PSA. Although the Company had been buying water from EWEB to serve the Company's customers under its existing permit, the Department viewed the Company as a possible regional water provider in lieu of or in addition to EWEB. (Fujii Aff. at 6.) No other entity has proposed to become a supplier serving multiple communities within or outside the PSA's UGB. (Test. of Fujii.)

(102) Thirty-four cfs is more water than needed to service the PSA, but the Department considered that, in addition to serving water within the PSA, the Company could also enter into agreements to supply water to many communities along the Willamette River which have their own water systems. Areas outside the PSA the Department included in this context were Eugene, Springfield, the area within the Company's current permit, the district supplied by the Layng Creek diversion, Veneta, Lowell, Goshen, and Blue River, but not including Monroe, Cheshire, or Junction City because of their distance from the proposed points of diversion. (Fujii Aff. at 7; test. of Fujii.)

(103) Although a full supply of primary and backup water for the entire region would require more than 34 cfs, the Department considered that the Company has the potential to be a supply source in addition to future sources that may develop for the region. (Test. of Fujii.) The Company considered that because there is already a substantial amount of treatment capacity available in the PSA, it could provide raw water rather than treated water to both Cottage Grove and Creswell and possibly exchange treated water back from the cities to the Company for use in the rural areas. The Company could also use existing treatment systems and intakes on the Springfield and EWEB side of the system; it need not create its own intake or treatment plant and then pump treated water to the cities. The Company thus could become an integral part of the regional planning concept without having to build its own treatment plant. (Test. of Hughes.)

(104) The Department considered that besides serving future growth in the urban areas, the Company could supply emergency backup water supply or augment city sources during periods of extreme water use or when maintenance activities might require a partial shut-down of city services. (Test. of Fujii.) Use of supplemental water by a city in this manner constitutes good planning practice and can save public resources because the city would not have to obtain its own water rights or design treatment facilities solely to accommodate the occasional need above the city's maximum monthly demand. (Hughes Ex. A. at 5.) The possibility of a city

getting a backup supply by connecting to a water purveyor by paying only when the city actually uses the water is more attractive than for the city to spend much public money building backup facilities. (Test. of Hughes.)

(105) The Department also compared the amount the Application requested to the amounts requested by other communities. The Department has allocated 24 cfs to Washington County and the Tualatin Water District, and 27 cfs to the City of Lake Oswego. The Department concluded that the Application for 34 cfs was reasonable given the PSA is a very large service area, the proposed use would include being a backup source for larger cities such as Springfield or Eugene, and industry may be developed in the unincorporated areas. (Fujii Aff. at 9.)

(106) The Department recognizes that providers often ask for more than they know they need because going through the application process can be expensive and takes time, and potential water users do not want to reapply a few years later if they find they do not have enough. No Oregon city wants to issue a growth moratorium based on having insufficient water, so they plan to have enough water for the coming 20 to 50 years. The providers do not know if the businesses or the people will come but they want to be prepared for a building boom or for water intensive businesses that may want to locate into the area. (Test. of French.)

(107) Although the applicant must justify its need, the Department must also consider that if it cut back the amount too much, the applicant may be unable to obtain a right to divert more water decades later when water may no longer be available for appropriation. Because the applicant will obtain a water right certificate only for the amount it actually puts to beneficial use, the Department views the permit phase as the period in which the applicant develops the water use and establishes the actual amount of beneficial use. (French Aff. at 8.) In the Department's view, the "failsafe at the end of the process" is that water masters can regulate off any uses that they determine are wasteful. The Department may issue a permit but cancel it a few years later for failure to perfect the water right. (Test. of French.)

(108) A municipal or quasi-municipal provider such as the Company could apply to the Department for an amount justified by a short-term demand forecast and then apply for more water some years later if demand increases. However, the water in the streams eventually will become allocated. The Department concluded that because of the long time required to get the permit, plan, raise money, and develop the infrastructure, it is better for a water provider such as the Company to ask for more water than it will need immediately to ensure that all its needs will be met. (Test. of French.)

#### *Development of the Water Use Under the Proposed Permit*

(109) The Application initially proposed that construction would begin under the permit on June 1, 2014, and would be completed and beneficial use of the water would begin on October 1, 2029. (OWRD Ex. A1 at 7.) On December 11, 2008, the Company revised the Application to change the type of use from municipal to quasi-municipal and to change the proposed date to complete construction and begin beneficial use to October 1, 2014. (OWRD Ex. A1 at 86.) The Company intends, immediately after the Department issues the water permit, to begin acquiring rights of way and agreements necessary to divert, treat, and deliver water from

the proposed water to meet existing demand. (Demers Aff. 8.)

(110) The Department concluded that the Company's Application provided information regarding the time within which the applicant proposes to begin construction, the time required to complete construction, and the time for the complete application of the water to the proposed use. "The [D]epartment takes the application at face value unless more information is provided." (French Aff. at 12.)

(111) A minimum of 10 years may be needed to begin delivering 34 cfs water to users, assuming it would take one year to complete the preliminary design and site selection, two years to complete the final plans and specifications, three years to obtain the necessary land, right of way, permits, and financing; and four years to select a contractor, complete construction, and test the system. (Davis Aff.)

(112) According to the Water Management and Conservation Plans Guidebook for Oregon Municipal Water Suppliers, Oregon's municipal water suppliers are permitted to "grow into" their water rights over time. Historically, the Department routinely issued five-year extensions to suppliers to continue developing municipal permits. Once a community grew to a size where the permit was fully used, the community submitted proof of perfection of the right and the Department issued a certificate of water right. (Test. of Fujii.; Demers Ex. L at 43.) The Department used a 40 to 50 year timeframe for the Company to fully develop the 34 cfs use, concluding that because of the many changes that may occur in the area that cannot be anticipated—including, for example, the quantity and quality of water in the aquifers—a 40 to 50 year timeframe is a reasonable amount of time to develop a regional supply. (Test. of Fujii.)

(113) The Department often approves applications by municipalities for more time to develop the water use. The Department may either severely condition or cut back the amount of water under the extension permit, although the Department has not done so in the past. It is possible that if the permit were issued and after five years the Company applied for an extension, the quantity could be reduced if there were some change in the circumstances. (Test. of French.)

### CONCLUSIONS OF LAW

(1) The public interest presumption was overcome because the Application did not satisfy the criterion of compliance with the Department's rules establishing land use compatibility.

(2) The proposed use will impair or be detrimental to the public interest because it does not propose actual beneficial use of the waters of this state under ORS 537.170(8)(a).

### DISCUSSION

#### *The Protest*

WaterWatch's protest asserted that (1) the permit Application does not comply with the Department's rules, (2) the requested amount of water cannot be beneficially used without waste,

and (3) the proposed use will impair or be detrimental to the public interest under ORS 537.170(8)(a) - (e). WaterWatch's protest also asserted that the PFO "is devoid of any analysis" relating to proposed beneficial use without waste; the PFO fails to include an "assessment" of the amount of water necessary for the proposed use as required by ORS 537.153(3)(c); and the Company's Application failed to show an ability or intent to complete the project within five years under ORS 537.230(1). These last three issues were resolved by the Ruling on Willamette Water Company's Motions for Summary Determination, which dismissed them from the case. Nevertheless, as explained in the discussion below, the issue of whether the Application proposed to put the requested amount of water to beneficial use within the time provided under ORS 537.230(1) remains relevant to the determination of whether the Application proposed a beneficial use without waste.

### *Burden of Proof*

WaterWatch asserted that its only burden in this case was

to show that there [is] not a preponderance of evidence to support [the Department's] findings and conclusions. \* \* \* To overcome the public interest presumption (ORS 537.153(2)), WaterWatch needs to show that the presumption was incorrectly established and that there was not enough evidence to support the presumption. To prevail, WaterWatch does not have to prove the opposite of any of [the Department's] findings or conclusions.

WaterWatch Closing Brief at 2. WaterWatch cited *Corcoran v. Board of Nursing*, 197 Or App 517 (2005) in support of its argument, but that decision is inapposite because it did not concern the effect of statutory presumptions.

WaterWatch's argument fails to recognize the procedural effect of the rebuttable presumption under ORS 537.153(2). Since the enactment of Oregon Evidence Code section 308 in 1981, the term "rebuttable presumption" "has acquired a well-defined legal meaning, which the courts consistently have endorsed," even in cases involving administrative proceedings.<sup>1</sup> *Lawrence v. Clackamas County*, 164 Or App 462, 468 (1999). Thus, "it becomes highly probable that when the legislature used the same term in [a statute]—enacted [after 1981]—it intended the term to mean the same thing it has come to mean generally since the enactment of OEC 308." *Id.* at 469. Indeed, "[w]hen the legislature intends to apply a presumption different from the one described in OEC 308, it says so." *Id.* at 468.

Under this well-defined meaning, the rebuttable presumption imposes on the party against whom it is directed the burden to prove the nonexistence of the presumed facts; and it binds the trier of fact if there is no opposing evidence. If there is opposing evidence, the trier of fact must weigh the evidence, giving the presumption evidentiary value, and determine on which side the evidence preponderates. See *Wright v. SAIF*, 289 Or 323, 331 (1980); *Lawrence*, 164 Or App at 466-468. Merely introducing some evidence in opposition to the presumption does not

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<sup>1</sup> OEC 308 [ORS 40.120] provides: "In civil actions and proceedings, a presumption imposes on the party against whom it is directed the burden of proving that the nonexistence of the presumed fact is more probable than its existence."



make the presumption “disappear”; the presumption is of no effect only if the opponent presents evidence that establishes the nonexistence of one or more of the basic facts giving rise to the presumption. *Wright*, 289 Or at 332. Thus, in *Barnett v. Redmond School District*, 209 Or. App. 724 (2006), the plaintiff, in attempting to enforce an alleged contract with the school district, presented evidence that established a rebuttable presumption that the school district performed its official duty of approving the contract. The district presented rebuttal evidence, but the court, citing *Wright*, explained that

[a]lthough the presumption is rebuttable, it does not disappear simply because contrary evidence is presented. The trier of fact must give the presumption the value of evidence and weigh it with the contrary evidence to determine if the required duty was performed. Consequently, there is an issue of fact whether the district approved the contract. The district has the burden of establishing its pleaded affirmative defense.

*Wright, id.*

ORS 537.153 was enacted in 1995. Therefore, under *Lawrence*, it is highly probable that the legislature intended “rebuttable presumption” as used in the statute to have the same meaning it has in other statutes and court decisions. There is nothing to suggest the legislature intended a different meaning. Accordingly, WaterWatch’s rebuttal evidence may give the trier of fact a basis to find contrary to the public interest presumption, but the presumption does not disappear because WaterWatch presented rebuttal evidence. As the protestant, WaterWatch has the affirmative burden to prove the nonexistence of the presumed facts by a preponderance of the evidence. ORS 537.153(2) and 40.120.

ORS 537.153(2) states the criteria for establishing the public interest presumption. It also describes what must be proved to overcome the presumption:

In reviewing the application under subsection (1) of this section, the department shall presume that a proposed use will not impair or be detrimental to the public interest if the proposed use is allowed in the applicable basin program established pursuant to ORS 536.300 and 536.340 or given a preference under ORS 536.310 (12), if water is available, if the proposed use will not injure other water rights and if the proposed use complies with rules of the Water Resources Commission. This shall be a rebuttable presumption and may be overcome by a preponderance of evidence that either:

(a) One or more of the criteria for establishing the presumption are not satisfied;  
or

(b) The proposed use will impair or be detrimental to the public interest as demonstrated in comments, in a protest under subsection (6) of this section or in a finding of the department that shows:

(A) The specific public interest under ORS 537.170 (8) that would be impaired or detrimentally affected; and

(B) Specifically how the identified public interest would be impaired or detrimentally affected.

See also OAR 690-310-0110.<sup>2</sup> ORS 537.170(8) states that if the public interest presumption is overcome, the Department must consider public interest factors described in the statute and determine whether the proposed use or the proposed use as modified would impair or be detrimental to the public interest.<sup>3</sup>

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<sup>2</sup> OAR 690-310-0110 states:

- (1) The Department shall presume that a proposed surface water use will not impair or be detrimental to the public interest if:
  - (a) The proposed use is allowed in the applicable basin program established pursuant to ORS 536.300 and 536.340 or given a preference under 536.310(12);
  - (b) Water is available;
  - (c) The proposed use will not injure other water rights; and
  - (d) The proposed use complies with the rules of the Commission.
- (2) The presumption described in section (1) of this rule is a rebuttable presumption and may be overcome by a preponderance of the evidence that either:
  - (a) One or more of the criteria for establishing the presumption are not satisfied; or
  - (b) The proposed use will impair or be detrimental to the public interest as demonstrated in comments, protests or a finding of the Department that shows:
    - (A) The specific public interest under ORS 537.170(8) that would be impaired or detrimentally affected; and
    - (B) Specifically how the identified public interest would be impaired or detrimentally affected.

<sup>3</sup> ORS 537.170(8) provides:

If the presumption of public interest under ORS 537.153 (2) is overcome, then before issuing a final order, the director or the commission, if applicable, shall make the final determination of whether the proposed use or the proposed use as modified in the proposed final order would impair or be detrimental to the public interest by considering:

- (a) Conserving the highest use of the water for all purposes, including irrigation, domestic use, municipal water supply, power development, public recreation, protection of commercial and game fishing and wildlife, fire protection, mining, industrial purposes, navigation, scenic attraction or any other beneficial use to which the water may be applied for which it may have a special value to the public.
- (b) The maximum economic development of the waters involved.
- (c) The control of the waters of this state for all beneficial purposes, including drainage, sanitation and flood control.
- (d) The amount of waters available for appropriation for beneficial use.
- (e) The prevention of wasteful, uneconomic, impracticable or unreasonable use of the waters involved.
- (f) All vested and inchoate rights to the waters of this state or to the use of the waters of this state, and the means necessary to protect such rights.

The evidence at the hearing established that the proposed use did not comply with the Department's rules requiring the applicant to show land use compatibility. Because compliance with the Department's rules is a criterion for the public interest presumption, the public interest presumption was overcome, and the Department's PFO was not entitled to the presumption. Further, the preponderance of the evidence showed that the Application proposed to appropriate more water than the Company could put to actual beneficial use within the time allowed under ORS 537.230(1). Because beneficial use requires actual use, the Application failed to propose a beneficial use under ORS 537.170(8)(a) and 537.153(2).

#### *Application and Review Process*

To acquire a right to appropriate surface water, a person first must apply to the Department for a permit to make the appropriation. ORS 537.130. The permit application must include the following information: (1) the source of the water supply; (2) the nature and amount of the proposed use; (3) the location and description of the proposed diversion; (4) the time within which the applicant proposes to begin construction; (5) the time required for completion of the construction; and (6) the time required for the complete application of the water to the proposed use. ORS 537.140(1)(a); OAR 690-310-0040; *Teel Irrigation Dist v. Water Resources Department*, 323 Or 663 (1996).

If the application contains the required information and the proposed use is allowed under ORS chapter 538, the Department must make a preliminary determination of:

- (a) Whether the proposed use is restricted or limited by statute or rule;
- (b) The extent to which water is available from the proposed source during the times and in the amounts requested; and
- (c) Any other issue the department identifies as a result of the initial review that may preclude approval of or restrict the proposed use.

ORS 537.150(4); *see also* OAR 690-310-0080.

After giving public notice of the application (*see* 690-310-0090), the Department must complete the application review and issue a proposed final order approving or denying the application or approving it with modifications or conditions. ORS 537.153(1). Subject to certain conditions not at issue in this case, the Department must approve "all applications made in proper form which contemplate the application of water to a beneficial use, unless the proposed use conflicts with existing rights." ORS 537.160(1). The application review is governed by the rebuttable presumption under ORS 537.153(2), as discussed above.

OAR 690-310-0120(2) describes what the Department must do if the public interest presumption is not established.<sup>4</sup> OAR 690-310-0120(3) describes what the Department must do

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(g) The state water resources policy formulated under ORS 536.295 to 536.350 and 537.505 to 537.534.

<sup>4</sup> OAR 690-310-0120(2) provides:

if the presumption is established.<sup>5</sup> OAR 690-310-0120(4) describes what the Department must do if it issues a proposed order recommending issuance of the permit and it receives a protest that asserts the public interest presumption is not established or should be overcome:

(4) If the Department determines that the presumption is established and not overcome under the provisions of section (3) of this rule, the Department shall issue a proposed final order recommending issuance of the permit subject to any appropriate modifications or conditions. If the Department then receives a protest

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If the Department determines that the public interest presumption is not established, the Department shall determine whether the proposed use will impair or be detrimental to the public interest considering the factors listed in ORS 537.170(8) and may either:

- (a) Propose denial of the application upon a finding that the use will impair or be detrimental to the public interest; or
- (b) Make specific findings to demonstrate that even though the presumption is not established, the proposed use will not impair or be detrimental to the public interest and propose approval of the application with appropriate modifications or conditions.

<sup>5</sup> OAR 690-310-0120(3) provides:

(3) If the Department determines that the presumption is established or that the proposed use can be modified or conditioned to meet the presumption criteria:

(a) The Department shall further evaluate the proposed use, any comments received, information available in its files or received from other interested agencies and any other available information to determine whether the presumption is overcome. The Department may find that the presumption is overcome if a preponderance of evidence shows that the proposed use will impair or be detrimental to the public interest as demonstrated in comments or a finding of the Department that shows:

- (A) The specific public interest under ORS 537.170(8) that would be impaired or detrimentally affected; and
- (B) Specifically how the identified public interest would be impaired or detrimentally affected.

(b) In making the determination in (3)(a) of this rule, the Department shall, at a minimum, consider the factors listed below, including any potential effects that the proposed use may have on these factors, where applicable:

- (A) Water use efficiency and the avoidance of waste;
- (B) Threatened, endangered or sensitive species;
- (C) Water quality, with special attention to sources either listed as water quality limited or for which total maximum daily loads have been set under section 303 (d) of the federal Clean Water Act and sources which the Environmental Quality Commission has classified as outstanding resource waters as defined in OAR 340-041-0006(42) ;
- (D) Fish or wildlife;
- (E) Recreation;
- (F) Economic development; and
- (G) Local comprehensive plans, including supporting provisions such as public facilities plans.

(c) In making the determination in (3)(a) of this rule, the Department may consult and communicate with state and federal agencies and local governments, as appropriate.

filed pursuant to OAR 690-310-0160, which asserts the presumption is not established or should be overcome, the Department shall evaluate the protest and supporting evidence in accordance with this section and section (5) - (7) of this rule. The Department shall find that the presumption is overcome if a preponderance of evidence shows that:

(a) One or more of the four presumption criteria listed in OAR 690-310-0110(1)(a)-(d) are not met; or

(b) The proposed use will impair or be detrimental to the public interest as demonstrated in comments, protests or a finding of the Department that shows:

(A) The specific public interest under ORS 537.170 (8) that would be impaired or detrimentally affected; and

(B) Specifically how the identified public interest would be impaired or detrimentally affected.

OAR 690-310-0120(5) and (6) describe the final order the Department must issue depending on whether the presumption is overcome:

(5) If the Department finds that under section (4) of this rule the presumption is overcome, the Department shall issue a final order in accordance with OAR 690-310-0190 denying the application unless the Department makes specific findings to demonstrate that considering all of the public interest factors listed in ORS 537.170(8) the issuance of a permit will not impair or be detrimental to the public interest.

(6) If the Department finds that under section (4) of this rule the presumption is not overcome, the Department shall issue a final order in accordance with OAR 690-310-0190 approving the application with any appropriate modifications or conditions.

OAR 690-310-0120(7) provides for a contested case hearing in the event a protest is filed that raises a significant dispute about the water use:

(7) If the Director finds that a significant dispute about the proposed water use related to the public interest exists and a protest has been filed under OAR 690-310-0160, the Director shall schedule a contested case hearing.

#### *Criteria to Establish the Presumption*

##### *Use in Applicable Basin Program*

Generally, water cannot be appropriated unless the proposed use is consistent with a basin program classification. OAR 690-502-0010(3). There is no dispute that the proposed use

is allowed in the applicable basin program. The McKenzie River, a tributary of the Willamette River, is located in the Willamette Basin. The Willamette Basin Program allows municipal uses of the McKenzie River. OAR 690-502-0080(1)(e).<sup>6</sup> Municipal uses include quasi-municipal uses. OAR 690-502-0010(15).<sup>7</sup>

#### *Water Availability*

The Department may allocate water for a proposed use only if the proposed use is within the capacity of the resource. OAR 690-410-0070. Water is available for appropriation if the source is not over-appropriated during any period of the proposed use. OAR 690-300-0010(57)(a).

There is no dispute that water is available for the proposed use. The Department conducted a water availability analysis, as defined in OAR 690-300-0010(58),<sup>8</sup> using its WARS program and determined that water is available for the proposed use throughout the year.

#### *Injury to Other Water Rights*

Based on information from the region's watermaster, the Department determined that the proposed use would not injure other water rights because its right would be junior to all previous water rights in the Willamette drainage. There was no evidence to the contrary.

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<sup>6</sup> OAR 690-502-0080(1) provides, in part:

The McKenzie River Subbasin includes the McKenzie River and tributaries above confluence with the Willamette River:

(1) Surface water classification:

\* \* \* \* \*

(e) Except as specified in subsection (a) of this section, the McKenzie River main stem down-stream from Paradise Campground near river mile 73 (Sec 9, T16S, R6E) is classified only for domestic, livestock, municipal, industrial, agricultural, commercial, power, mining, fish life, wildlife, recreation, pollution abatement, wetland enhancement, off-channel power development in conjunction with storage and public instream uses[.]

<sup>7</sup> OAR 690-502-0010(15) provides:

"Municipal Use" means the delivery and use of water through the water service system of an incorporated municipality or a nonprofit corporation and includes quasi-municipal uses as defined in OAR 690-011. [Sic]

<sup>8</sup> OAR 690-300-0010(58) states:

"Water Availability Analysis" means the investigation of stream flow or ground water measurement records, watermaster distribution records, flow requirements of existing water rights, stream flow modeling in ungauged basins, minimum perennial stream flows, or scenic waterway flow requirements to determine if water is available to support the proposed water use.

### *Compliance with Department's Rules*

In determining whether a surface water application in the Willamette Basin complies with the Department's rules, the Department reviews the application under OAR chapter 690, divisions 33 (additional public interest standards with regard to sensitive, threatened, or endangered fish species) and 502 (Willamette Basin Program). The Application complied with the Willamette Basin Program, and the division 33 review resulted in conditions being placed on the draft permit relating to measurement, recording, and reporting of water use information; minimum flow requirements; submission of water management and conservation plans; fish screening and by-pass devices; and fish passage requirements.

The Department also reviews surface water applications for compliance with the state water resources policy and statewide water resources management rules under divisions 400 and 410. The Department's water allocation policy, at OAR 690-410-0070, provides, in part:

(1) Policy. The waters of the state shall be allocated within the capacity of the resource and consistent with the principle that water belongs to the public to be used beneficially without waste. Water shall be allocated among a broad range of beneficial uses to provide environmental, economic, and social benefits. The waters of the state shall be protected from over-appropriation by new out-of-stream uses of surface water or new uses of groundwater.

(2) Principles. Programs to achieve the policy in section (1) of this rule shall be guided by the following principles:

(a) The surface waters of the state shall be allocated to new out-of-stream uses only during months or half-month periods when the allocations will not contribute to over-appropriation. \* \* \* ;

\* \* \* \* \*

(f) Water shall not be allocated if the proposed use would injure the exercise of existing water rights or permits;

(g) The Scenic Waterways Act declares that the highest and best uses of the waters within State Scenic Waterways are fish, wildlife, and recreation. Allocations to new out-of-stream uses in State Scenic Waterways shall be consistent with the Scenic Waterways Act. Allocations to new out-of-stream uses in and above State Scenic Waterways shall not interfere with the maintenance of flow levels necessary for the purposes of Scenic Waterways;

(h) When instream flow needs are not protected by instream water rights, new out-of-stream allocations may be limited or conditioned to protect public uses;

(i) When allocating water for new uses, the Commission shall assure compliance with the Statewide Planning Goals and compatibility with local comprehensive

plans in accordance with the Department's certified State Agency Coordination Program[.]

There is no dispute that the Department's proposed issuance of the permit complies with OAR 690-410-0070(2)(a), (f), (g), and (h). As discussed above, water is available for the proposed use year-round and there is no evidence that the proposed use would injure existing water rights or permits. The proposed use is not located within or above a State Scenic Waterway. As a result of the division 33 review, to protect instream water rights the Department imposed the condition that the Company may divert water only when flows in the McKenzie River are at least 2000 cfs at the point of diversion.

### *Land Use Compatibility*

The Application did not comply with OAR 690-410-0070(2)(i)—which requires compliance with the Statewide Planning Goals and compatibility with local comprehensive plans—or with OAR 690-005-0035, which requires that the Commission's or Department's actions on applications and permits “shall be compatible with acknowledged comprehensive plans.”<sup>9</sup>

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<sup>9</sup> OAR 690-005-0035 provides, in part:

(1) Except as provided in section (5) of this rule, Commission or Department actions taken pursuant to a program identified in OAR 690-005-0025 shall be compatible with acknowledged comprehensive plans.

\* \* \* \* \*

(3) For water use approvals identified in OAR 690-005-0025(1) through (6), the Commission or Department shall satisfy compatibility requirements of ORS 197.180 by informing applicants that:

(a) The Department's issuance of a permit or other approval is not a finding of land use compatibility; and

(b) A land use approval may be required from the affected local government.

(4) In processing water use approvals in OAR 690-005-0025(1) through (6), the Department or Commission shall:

(a) Require land use information be submitted with applications or requests, or as otherwise specified prior to taking action on the water use approval. The information shall be sufficient to assess compatibility as specified on forms contained in the department's Land Use Planning Procedures Guide;

(b) Except as provided in subsection (4)(c) of this rule, the Department or Commission shall only approve the proposed water use if:

(A) All requirements of statutes and rules governing Commission and Department actions are met;

(B) The land use served by the proposed water use is allowed outright or does not require discretionary land use approvals under the applicable comprehensive plan; or

(C) The applicant has already received necessary land use approvals for the land use served by the proposed water use.

(c) If local land use approvals are pending, place conditions on a permit or other approval to preclude use of water and any associated construction until the applicant obtains all required local land use approvals; or, withhold issuance of the water use permit or approval until the applicant obtains all required local land use approvals. The approval is



OAR 690-005-0035(4)(b) provides that in processing water use applications and permits, the Department or Commission shall approve the proposed water use only if:

(A) All requirements of statutes and rules governing Commission and Department actions are met;

(B) The land use served by the proposed water use is allowed outright or does not require discretionary land use approvals under the applicable comprehensive plan; or

(C) The applicant has already received necessary land use approvals for the land use served by the proposed water use.

Because these conditions are in the alternative, meeting any of the three alternatives satisfies the condition for approval. The Application did not meet OAR 690-005-0035(4)(b)(A) because the Company had not submitted land use information that is "sufficient to assess compatibility," as required by subdivision (4)(a) of the rule. In its December 19, 2008, notice, the Department expressly informed the Company that, before a permit would issue, the Company must provide documentation of land use compliance or documentation showing the Company was "actively pursuing approval" from the local land use jurisdictions. The LUCS from Springfield and Lane County showed that discretionary land use approvals may be required, but the Company has not yet designed the proposed diversion and delivery system and has not applied to Springfield and Lane County for land use approvals. Therefore, the Company did not submit land use information sufficient for the Department to assess the compatibility of the proposed use with applicable land use plans. The Department did not explain how it could make the required compatibility assessment in these circumstances.

The Department asserted that even if land use approvals have not been obtained, it may issue a permit with a condition that requires the applicant to show land use compatibility before the use begins, thus allowing the land use approval process to move forward.<sup>10</sup> The draft permit

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allowed only if the use meets requirements in paragraph (4)(b)(A) of this rule. The Department may consider withholding water use approvals upon request by a local or state agency, or the applicant, or as otherwise warranted to serve the Department's needs; and

(d) Not issue water use approvals, except when taking action pursuant to section (5) of this rule if:

(A) The land use served by the proposed water use is not allowed by the comprehensive plan and the applicant is not pursuing necessary local land use approvals to the satisfaction of the planning department of the affected local government; or

(B) The land use served by the proposed water use is not allowed by the comprehensive plan and local approvals have already been denied.

(5) If the Commission or Department finds it necessary to take an action which is incompatible with an acknowledged comprehensive plan in order to meet statutory obligations, the dispute resolution procedures identified in OAR 690-005-0040 shall be implemented prior to taking such action.

<sup>10</sup> OAR 690-005-0015(5) provides:

contained no such condition. Rather, it contained only a “standard condition” that “[b]y law, the land use associated with this water use must be in compliance with statewide land-use goals and any local acknowledged land-use plan.” (OWRD Ex. A1 at 329.) Further, issuing a permit even with such a condition violates OAR 690-005-0035(4)(b)(B) and (C). These rules allow the Department or the Commission to approve the Application only if “[t]he land use served by the proposed water use is allowed outright or does not require discretionary land use approvals” or the Company “has already received necessary land use approvals for the land use served by the proposed use.”

The Company acknowledged that the infrastructure to deliver water must be located on many kinds of lands in different land use zones, and the Company will need discretionary land use approvals from Lane County or Springfield to get the water from the points of diversion to the places of use in rural areas. But the Company argued that OAR 690-005-0035(4)(b)(B) does not bar the Application’s approval because the rule concerns “the land use served by the proposed water use,” or, in other words, the legality of the use at the destination, rather than approvals for conveyance facilities. The Company asserted that although it may need approvals for conveyance facilities, the Application’s proposed uses are allowed outright: farm uses, including residences and farm irrigation; rural residential; rural commercial; rural industrial; and nonfarm uses listed in ORS 215.213(1).

The Department disagreed with the Company that the proposed use is allowed outright in Lane County, because Lane County has stated that discretionary approvals are still needed for construction associated with the conveyance system. The Department acknowledged that its boilerplate “standard condition” is not a finding of land use compatibility. *See* OAR 690-005-0035(3)(a). Nevertheless, the Department asserted that imposing the condition in the permit is the safeguard against permitting a use that is incompatible with land use plans.

The Department’s argument fails to address OAR 690-005-0035(4)(c) and (d). Subdivision (4)(c) allows the Department to place conditions on the permit to preclude water use and any associated construction until the applicant obtains all required approvals, but only “[i]f land use approvals are pending.” “Pending” is not defined in the rule or statute. If it means merely that an application for land use approval will be submitted in the future, then there was no need to include the quoted phrase in the rule. For the phrase to have any significance, it must mean that an application for approval had been submitted and the applicant was waiting for approval. The Department’s December 19, 2008, notice shows that the Department interprets the rule as requiring the Company—before the Department would issue its PFO—to demonstrate the Company was “actively pursuing approval,” not merely intending to apply for it later.

Subdivision (4)(d) also supports that reading. It requires that water use applications must

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“Land Use Approval” means a final decision or determination made by a local government that concerns the adoption, amendment, or application of: the goals; a comprehensive plan provision; implementing ordinance; or a new land use regulation. A land use approval does not include ministerial decisions of local governments (i.e., building permits) for which no right to hearing is provided. A land use approval is final when all corresponding appeal periods have expired.

be denied if the land use served by the proposed water use is not allowed and the applicant is not pursuing necessary land use approvals. The Company's proposed water use is not allowed until it has applied for discretionary land use approvals and the local governments have made their determination. "Pursuing" implies current action, not merely a future intention. Issuing a permit when the Company is not pursuing land use approvals would violate this rule, even if the permit contained a condition prohibiting use until the land use approvals have been obtained.

ORS 537.211(2) allows the Department to issue a final order approving the application with a condition requiring the applicant to obtain lawful access to the points of diversion or delivery:

Except as provided in subsection (6) of this section, if an application under ORS 537.140 or 537.400 indicates that the applicant does not have written authorization or an easement permitting access to nonowned land crossed by the proposed ditch, canal or other work, the department may issue a final order approving the application if the approval includes a condition requiring the applicant to obtain such written authorization, or easement or ownership of such land and to provide the department with a copy of the written authorization, easement or evidence of ownership.

The statute mentions nothing about land use approvals; it concerns only lawful access to land, not compliance with land use laws. No statute provides for issuance of a final order with similar conditions when an applicant does not have necessary land use approvals. Even if the statute applies to land use approvals, for ORS 537.211(2) and OAR 690-005-0035(4)(d) to be consistent, they must be read to apply only when the applicant has requested land use approvals and such approvals are pending when the Department issues its conditional permit.

Similarly, the provision in OAR 690-005-0035(3)—that the Department "shall satisfy compatibility requirements of ORS 197.180 by informing applicants" that permit issuance is not a finding of land use compatibility and land use approval may be required—does not authorize the Department to issue a permit if land use approvals are required and the applicant has not applied to obtain them. To read OAR 690-005-0035(3) as so authorizing the Department would require ignoring OAR 690-005-0035(4).

WaterWatch also contended that the Company is unlikely to obtain the land use approvals it needs to serve the areas outside the UGBs of Cottage Grove and Creswell, the "rural" portion of the PSA. Wilson, WaterWatch's expert witness on land use law, asserted that the Company proposed to provide "urban water service" that can be provided only to development inside the UGB. Wilson suggested that because the water originated within the UGB, it can only be used within the UGB; and rural population growth cannot be legally serviced with "urban water."

The argument was overstated. Statewide Planning Goals and Guidelines, Goals 11 and 14, do not prohibit rural landowners from receiving water from a municipal piped water system; water for human consumption may be piped into rural areas. However, OAR 660-011-0065(2), which implements Goal 11, prohibits land use regulations that allow an increase in rural density

due to the availability of water from a water system.<sup>11</sup> Lane County's Comprehensive Plan and its related zoning regulations limit development to "rural" use levels. But rural uses include uses of water that the Company could lawfully supply.

*Impairment of or Detriment to Public Interest*

The criteria for establishing the public interest presumption has been overcome by the showing of the Application's noncompliance with the Department's rules relating to land use compatibility. Therefore, under OAR 690-310-0120(5), the Department must deny the application unless the Department considers the public interest factors stated in ORS 537.170(8) and finds that issuance of a permit will not impair or be detrimental to the public interest.

Under ORS 537.170(8)(a), the Department must consider whether the Application proposes a "beneficial use," "[c]onserving the highest use of the water for all purposes, including \* \* \* any other beneficial use to which the water may be applied[.]" Beneficial use is "the basis, the measure and the limit of all rights to the use of water in this state." ORS 540.610(1).

Beneficial use has two different components: the type of use and the amount of use. Janet Neuman, *Beneficial Use, Waste, and Forfeiture: The Inefficient Search for Efficiency in Western Water Use*, 28 Env'tl L 919, 926 (1998) (Neuman).

In order to be legally beneficial, the type of use must be something socially acceptable. As to the amount of use, there must be *actual use* in an amount that is not wasteful. If a water user uses too much water, he is wasting it, and if he does not use it at all, he is obviously not beneficially using it.

*Id.* [footnotes omitted, italics added].

There is no dispute that the proposed use is considered a type of beneficial use. ORS 536.300(1) specifically declares "water for domestic, municipal, irrigation, power development, industrial, mining, recreation, \* \* \* uses and for pollution abatement" are beneficial uses; and OAR 690-400-0010(3) defines "beneficial use" to include "domestic, \* \* \* industrial, irrigation, mining, municipal, pollution abatement, [and] power development," uses. "Municipal use" include "quasi-municipal use." OAR 690-502-0010(15).

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<sup>11</sup> OAR 660-011-0065(2) provides:

Consistent with Goal 11, local land use regulations applicable to lands that are outside urban growth boundaries and unincorporated community boundaries shall not:

- (a) Allow an increase in a base density in a residential zone due to the availability of service from a water system;
- (b) Allow a higher density for residential development served by a water system than would be authorized without such service; or
- (c) Allow an increase in the allowable density of residential development due to the presence, establishment, or extension of a water system.

The central issue in this case is whether the Application proposes the *actual* use of 34 cfs of water. In considering the Application, the Department must find that the requested amount of water is necessary for the proposed use. ORS 537.153(3)(c); OAR 690-310-0150(2)(d). The Department cannot “approve an application for more water than can be applied to beneficial use.” ORS 537.190(1). If the Company cannot actually use the requested amount, then the Application does not propose a beneficial use under ORS 537.170(8)(a).

The Department acknowledged that 34 cfs is more water than currently needed in the PSA. Nevertheless, the Department justified the proposed approval on the ground that, over a 40-year development period, water demand in the region is likely to increase and the Company could become a provider of both primary and backup water supplies to the PSA and areas near or contiguous to the PSA. The evidence established that the Department’s concern for developing water supply sources in the region is justified. Nevertheless, the evidence also established that the Company cannot actual use the requested amount within the time required under ORS 537.230(1) and that, because the Company is not a municipality, it is not entitled to the extended development time allowed for municipalities to develop their water right.

WaterWatch also contends that the proposed use would be a “wasteful, uneconomic, impracticable or unreasonable use of the waters involved,” under ORS 537.170(8)(e). OAR 690-400-0010(16) defines “waste” as “the continued use of more water than is needed to satisfy the specific beneficial uses for which a right was granted.” These provisions concern the efficient continued use of water. The issue in this case is not whether the Application proposes inefficient or unnecessary continued use of water; there is no evidence that the Company intends to inefficiently use too much water. Rather, the issue is whether the Company can put the proposed amount of water to actual beneficial use.

### *Quantification of Demand*

To justify the amount of water it requested, the Company prepared an estimate of water demand based on a per capita approach. The estimate was flawed by the facts that it overestimated population growth in the PSA and double-counted the commercial and industrial demand. Moreover, it failed to account for declining rates of use resulting from conservation regulations. WaterWatch contended that the demand estimate was further flawed by its reliance on commercial and industrial water demand information from the Port of Morrow. WaterWatch submitted its own, much lower, per capita demand estimate.

Although the per capita approach is the simplest method of estimating future water demand, no statute or regulation requires the Department to consider demand based only on per capita use. The per capita approach is applicable to suppliers whose customer base is homogeneous, and it is relevant for considering the design of a water delivery system’s treatment capacity, where the concern is to avoid overbuilding or underbuilding the system’s infrastructure. It does not accurately capture a community’s total water needs. It represents demand for treated water only and does not reflect the water needed to operate municipal systems (such as back flushing) or water in reservoirs to maintain water pressure. Further, assessing need in per capita terms precludes consideration of water needed for backup supplies or redundancies. Thus, the method is not the most reliable in forecasting municipal water demand in a large region decades

in the future, involving possible demand for treated and untreated water for a wide mix of uses, many of which are yet to be developed and the necessary infrastructure has yet to be determined. For that purpose, using low end or mid-range estimates based on per capita data are inappropriate.

At the hearing, the Company submitted Hughes's alternative demand analysis. Relying on similar data that the Company and WaterWatch used in their per capita estimates, Hughes's analysis assumed that the Company would provide emergency water supplies to Creswell and Cottage Grove. Hughes relied on the Port of Morrow's commercial and industrial use information, asserting that reliance on the information was justified because the Port of Morrow is one of the few sources that separately identifies industrial and commercial water uses, especially of high intensity water uses. Hughes's analysis continued to assume a 40-year development period and assumed that all commercial and industrial demand would have been completely developed by the end of that period.

In assessing the reasonableness of the Application for 34 cfs, the Department relied primarily on Fujii and his experience working with quasi-municipal and municipal water providers in Oregon. Neither Fujii nor the Department prepared a written analysis of their assessment of the requested amount; they did not make a quantitative demand estimate or project specific amounts of water needed within the PSA. The Department compared the amount the Application requested to the amounts requested by municipalities in the Willamette Valley and concluded that the Application for 34 cfs was reasonable given the PSA is a very large service area, the proposed use could be a backup source for larger cities such as Springfield or Eugene, and industry may be developed in the unincorporated areas in the future.

Although the Company could apply to the Department for an amount justified by a short-term demand projection and then apply for more water some years later if demand increases, the Department reasoned that if the Company obtained a permit and 10 years later decided it needed more water, there may not be any water left for appropriation. The Department concluded that because of the time required to get the permit, plan, raise money, and develop the infrastructure, it would be better for the Company to ask for a more water than it needed immediately to ensure that all its future needs will be met.

The legislature has directed the Commission to "progressively formulate an integrated, coordinated program for the use and control of all the water resources of this state," and has declared the policy that "[i]t is in the public interest that integration and coordination of uses of water and augmentation of existing supplies for all beneficial purposes be achieved for the maximum economic development thereof for the benefit of the state as a whole[.] ORS 536.300(2) and 536.310(2).<sup>12</sup> Under such directives and policies—and given the fact that the

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<sup>12</sup> ORS 536.300(2) provides:

Based upon said studies and after an opportunity to be heard has been given to all other state agencies which may be concerned, the commission shall progressively formulate an integrated, coordinated program for the use and control of all the water resources of this state and issue statements thereof.

Department cannot force communities to develop backup supplies or participate in coordinated water planning—the Department views its role in the water allocation process as making many options available for municipalities and other users to meet their water supply needs. The Department encourages regional water supply planning and management by granting to appropriate applicants permits for wide distribution of water and through requiring water providers to submit water management and conservation plans. Allowing only piecemeal, single-purpose water appropriation would promote continued fractionalization of water supplies and be contrary to the policy of coordinating water supply in the region. ORS 536.310(2) and (5); OAR 690-502-0020(3).

The Department has been concerned about the water supply in the PSA for many years. Although Cottage Grove and Creswell have their own surface water rights, the amount of surface water actually available year-round is a fraction of the “paper rights.” The surface water rights are to sources that have insufficient flows during some months, are limited to fire protection use in some cases, and generally are junior to instream water rights. The amount of water subject to instream rights exceed the flows in most streams in the region during most of the year. There are also substantial concerns regarding mercury contamination of surface waters in the area.

The cities and the rural areas in the PSA have access to ground water, but ground water supplies generally are inadequate. The unincorporated areas do not have existing ground water supplies adequate to serve new industries. Because of the hydraulic connection between surface water and ground water, continued use of ground water in the PSA will decrease the natural discharge to streams; additional consumptive use of the ground water would impact the already insufficient stream flows. Uses currently planned for the area, such as wood products mills or rural residential development at the zoned density, may cause further depletion of ground water.

There is no dispute that ground water supplies in the PSA generally have a high risk of unacceptable arsenic levels for drinking water. For a municipality and for individual homeowners in the PSA, treating water for human consumption is very expensive. Therefore, it is likely that many homeowners in the rural areas with ground water wells would tie into a treated water system if treated water became available. One benefit of community water systems over ground water wells is that they are routinely tested to meet drinking water standards.

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ORS 536.310 provides, in part:

In formulating the water resources program under ORS 536.300 (2), the Water Resources Commission shall take into consideration the purposes and declarations enumerated in ORS 536.220 and also the following additional declarations of policy:

\* \* \* \*

(2) It is in the public interest that integration and coordination of uses of water and augmentation of existing supplies for all beneficial purposes be achieved for the maximum economic development thereof for the benefit of the state as a whole;

\* \* \* \*

(5) Competitive exploitation of water resources of this state for single-purpose uses is to be discouraged when other feasible uses are in the general public interest[.]

Although there are several federal reservoirs in the southern Willamette Basin, no water from the reservoirs are available for non-irrigation use in the region. Even if stored water became available for such use in the future, it is likely to be at a prohibitively high cost, reflecting the cost to comply with dam modifications to meet fish protection measures.

Currently, there is no supplier capable of providing sufficient water to meet emergency needs in the PSA. EWEB is a potential supplier to the region, but the issue of whether it can legally supply water to areas outside Eugene's UGB is unsettled.

The Department proposed to approve the Application based on the Department's view of the Company as a supplier of primary water and supplemental or backup water to augment supplies not only to the PSA but to the surrounding region. The Application listed the PSA as the "Goshen area south to Cottage Grove—approximately 75 square miles," listed Pleasant Hill, and showed that it intended to serve other parts of Lane County near the PSA.

The preponderance of the evidence established that there is an inchoate or potential demand for backup water supplies to meet municipal water use needs in and around the PSA, and the demand is likely to increase and become more particular in the coming decades. Nevertheless, the Company currently has no contracts to sell water and has not established that it will obtain such contracts in the future. Except for the Raven Group, LLC, the Company identified no commercial or industrial user that is likely to be its customer. Creswell and Cottage Grove account for a large part of the Application's proposed water use, but the cities have their own water supplies and treatment systems and they expressed no commitment to obtain water from the Company if it obtains the permit. Moreover, ORS 537.140 requires that the application identify "the location and description of the proposed ditch, canal or other work"; state "whether the applicant has written authorization or an easement permitting access to nonowned land crossed by the proposed ditch, canal or other work"; and "establish the location of the proposed point of diversion and the proposed place of use \* \* \* along with a notation of the acreage of the proposed place of use, if appropriate." ORS 537.140(1)(a)(D), (E), and (4). But the Company has not yet determined what, if any, water conveyance facilities it will need, where they will be located, where the places of use will be, or whether it will supply treated or untreated water or both.<sup>13</sup>

#### *Actual and Timely Use of Requested Amount*

Essentially, the Department proposes to give the Company priority to a substantial amount of water that the Company can appropriate and sell as demand may develop in the future. The Department acknowledges that full development of the water right would take decades, assuming that the demand materializes. The Department reasons that if the demand does not materialize or the Company fails to make satisfactory developmental progress, it may later cut

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<sup>13</sup> WaterWatch asserted that the Company's selling untreated water would be inconsistent with quasi-municipal use under OAR 690-400-0070(1), but it provided no authority or argument in support of that assertion. There was no evidence that untreated water could not constitute a municipal or quasi-municipal use under the broad definitions of municipal and quasi-municipal water use in OAR 690-300-0010(29) and (40).



back on the amount permitted. But neither the Company nor the Department identified any objective measures governing the Department's review of demand and development progress in the future. In these circumstances, approval of the Application amounts to approval of a speculative use.

The beneficial use doctrine and its corollaries, waste and forfeiture, have three purposes: 1) to prevent speculation in and monopoly of scarce and valuable water; 2) to maximize the use of that scarce resource to support many uses and thereby promote economic development; and 3) to provide flexibility to the water user, allowing the user (rather than courts, legislatures, or agencies) to determine appropriate improvements in water use practices. *Neuman*, 28 Env'tl L at 962-963. Speculation "refers to acquiring a resource or good for later use or resale rather than for immediate, actual use." *Id.*

To serve the anti-speculation purpose, the beneficial use doctrine requires that water be put to actual use:

The actual use component of the beneficial use doctrine guarded against speculation and monopoly. Because actual, beneficial use was required, no one could acquire all of the water and thereby monopolize a scarce and valuable resource. Nor could anyone speculate by holding water without using it, and then make a steep profit by selling it to those who needed it."

*Neuman* at 964-965. Although speculation in land is lawful, the "adoption and codification of the beneficial use doctrine [in the Western states] assured that there would be no speculation in water." *Id.*

But as the West began to urbanize, the prohibition against speculation was a barrier to planning and development of adequate municipal supplies. Therefore, "[m]ost states eliminated this barrier by providing special protections for municipalities, allowing them to hold, or at least acquire rights to, water supplies for future use. But for everyone else, the requirement of actual beneficial use remained." *Id.* at 965.

No one in the West, except municipalities or states, holds water for future use. Every other water rights holder must continually demonstrate ongoing beneficial use, with, at most, a four-year break in use now and then. \* \* \* In this sense, water is treated differently than land. Speculators can (and do) buy and hold land for future uses, but they cannot easily do the same with water.

*Neuman* at 968 (internal footnotes omitted).

Cities enjoy an exemption from the anti-speculation principle under the "growing cities" doctrine, which allows cities to perfect water rights to amounts of water that they will need in advance of demand. See Sandra Zellmer, *The Anti-speculation Doctrine and Its Implications for Collaborative Water Management*, 8 Nev L J 994, 1013 (Spring 2008); A. Dan Tarlock & Sarah B. Van de Wetering, *Western Growth and Sustainable Water Use: If There Are No "Natural Limits," Should We Worry About Water Supplies?* 27 Publ Land & Resources L Rev 33, 50-51

(2006) (*Tarlock*).

In Oregon, the Department's practice for municipal water suppliers has been to allow such suppliers to "grow into" their water rights over time. Historically, the Department routinely issued five-year extensions to suppliers to continue developing municipal permits. The Department was authorized to do so because municipalities are statutorily exempt from, among other things, the requirement that the permit holder complete construction within five years from the approval date (ORS 537.230(1))<sup>14</sup>; cancellation of the permit for failure to complete construction within the prescribed time (ORS 537.410(2))<sup>15</sup>; the requirement that the water use be on land to which the water right is appurtenant (ORS 540.510(3))<sup>16</sup>; and the presumption of forfeiture for failure to use the water right for five consecutive years (ORS 540.610(2) and (3))<sup>17</sup>.

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<sup>14</sup> ORS 537.230(1) provides:

Except for a holder of a permit for municipal use, the holder of a water right permit shall prosecute the construction of any proposed irrigation or other work with reasonable diligence and complete the construction within a reasonable time, as fixed in the permit by the Water Resources Department, not to exceed five years from the date of approval.

<sup>15</sup> ORS 537.410(2) provides:

However, permits issued by the commission to irrigation districts for reclamation purposes under the irrigation district laws of this state, to municipal corporations for municipal uses or purposes or to public utilities complying with subsection (3) of this section for an energy facility granted a site certificate by the Energy Facility Siting Council, are not subject to cancellation under the provisions of ORS 537.410 to 537.450.

<sup>16</sup> ORS 540.510(3) provides:

(a) Any water used under a permit or certificate issued to a municipality, or under rights conferred by ORS 538.410 to 538.450, or under the registration system set forth in ORS 537.132, may be applied to beneficial use on lands to which the right is not appurtenant if:

(A) The water is applied to lands which are acquired by annexation or through merger, consolidation or formation of a water authority, so long as the rate and use of water allowed in the original certificate is not exceeded;

(B) The use continues to be for municipal purposes and would not interfere with or impair prior vested water rights; or

(C) The use is authorized under a permit granted under ORS 468B.050 or 468B.053 and for which a reclaimed water registration form has been filed under ORS 537.132.

(b) As used in this subsection, "municipality" means a city, a port formed under ORS 777.005 to 777.725, 777.915 to 777.953 and 778.010, a domestic water supply district formed under ORS chapter 264, a water supplier as defined in ORS 448.115 or a water authority formed under ORS chapter 450.

<sup>17</sup> ORS 540.610(2) provides, in part:

Upon a showing of failure to use beneficially for five successive years, the appropriator has the burden of rebutting the presumption of forfeiture by showing one or more of the following:

Moreover, for applications filed by public corporations, the Department may issue a permit without requiring the applicant to obtain prior written authorization or an easement permitting

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(a) The water right is for use of water, or rights of use, acquired by cities and towns in this state, by appropriation or by purchase, for all reasonable and usual municipal purposes.

(b) A finding of forfeiture would impair the rights of such cities and towns to the use of water, whether acquired by appropriation or purchase, or heretofore recognized by act of the legislature, or which may hereafter be acquired.

(c) The use of water, or rights of use, are appurtenant to property obtained by the Department of Veterans' Affairs \* \* \* .

(d) The use of water, or rights of use, under a water right, if the owner of the property to which the right is appurtenant is unable to use the water due to economic hardship as defined by rule by the Water Resources Commission.

(e) The period of nonuse occurred during a period of time within which land was withdrawn from use in accordance with the Act of Congress of May 28, 1956 \* \* \* or the Federal Conservation Reserve Program \* \* \* .

(f) The end of the alleged period of nonuse occurred more than 15 years before the date upon which evidence of nonuse was submitted to the commission or the commission initiated cancellation proceedings under ORS 540.631, whichever occurs first.

(g) The owner of the property to which the water right was appurtenant is unable to use the water because the use of water under the right is discontinued under an order of the commission under ORS 537.775.

(h) The nonuse occurred during a period of time within which the water right holder was using reclaimed water in lieu of using water under an existing water right.

(i) The nonuse occurred during a period of time within which the water right holder was reusing water through land application as authorized by ORS 537.141 (1)(i) or 537.545 (1)(g) in lieu of using water under an existing water right.

(j) The owner or occupant of the property to which the water right is appurtenant was unable to make full beneficial use of the water because water was not available. \* \* \*

(k) The holder of a water right is prohibited by law from using the water. \* \* \* .

(L) The nonuse occurred during a period of time within which the exercise of all or part of the water right was not necessary due to climatic conditions, \* \* \* .

(m) The nonuse occurred during a period of time within which the water was included in a transfer application pending before the Water Resources Department.

(n) The nonuse of a supplemental water right occurred during a period of time when the primary water right used in conjunction with that supplemental water right was leased as an in-stream water right pursuant to ORS 537.348.

ORS 540.610(3) provides:

Notwithstanding subsection (1) of this section, if the owner of a perfected and developed water right uses less water to accomplish the beneficial use allowed by the right, the right is not subject to forfeiture so long as:

The user has a facility capable of handling the entire rate and duty authorized under the right; and

The user is otherwise ready, willing and able to make full use of the right.

access to nonowned lands affected by the proposed project.<sup>18</sup>

The Oregon legislature has not extended these municipal use “preferences” to holders of quasi-municipal water permits. On the contrary, the Department’s rule, OAR 690-300-0010(40), expressly made these statutory municipal preferences and exemptions inapplicable to quasi-municipal water uses:

\* \* \* A quasi-municipal water right shall not be granted the statutory municipal preferences given to a municipality under ORS 537.190(2), 537.230(1), 537.352, 537.410(2), 540.510(3), 540.610(2), (3), or those preferences over minimum stream flows designated in a basin program.

OAR 690-300-0010(40).<sup>19</sup>

Under ORS 537.230(1), a holder of a non-municipal use permit must prosecute the construction of the water system with reasonable diligence and complete the construction within a reasonable time, as fixed in the permit by the Department, “not to exceed five years from the date of approval.” ORS 537.230(1). For good cause shown, the Department may allow extensions beyond the five-year limitation. ORS 537.230(3); *Teel Irrigation Dist. v. Water Resources Dept.*, 323 Or 663, 666-667 (1996).<sup>20</sup>

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<sup>18</sup> ORS 537.211(6) provides:

For an application made by or on behalf of a public corporation, the department may issue a permit approving the application without requiring the applicant to obtain prior written authorization or an easement permitting access to nonowned lands affected by the proposed project. However, nothing in this subsection shall be construed to allow any person to trespass on the lands of another person.

The Department had informed the Company on December 19, 2008, that “[p]rior to permit issuance, if one is issued, the Department must receive evidence that you have written authorization or easement permitting access to lands not owned by you nor owned by customers to which you will provide water.” Yet, the Company has stated it had no intention of obtaining rights of way and agreements necessary to divert and deliver water until after the Department issues a water permit. The Department has proposed to issue a permit despite the Company’s explicit disregard of the Department’s stated requirement.

<sup>19</sup> The full text of OAR 690-300-0010(40) states:

“Quasi-Municipal Water Use” means the delivery and use of water through the water service system of a corporation other than a public corporation created for the purpose of operating a water supply system, for those uses usual and ordinary to municipal water use, or a federally recognized Indian tribe that operates a water supply system for uses usual and ordinary to a municipal water use. A quasi-municipal water right shall not be granted the statutory municipal preferences given to a municipality under ORS 537.190(2), 537.230(1), 537.352, 537.410(2), 540.510(3), 540.610(2), (3), or those preferences over minimum stream flows designated in a basin program.

<sup>20</sup> ORS 537.230(1), (2), and (3) states, in part:

In 2004, the Oregon Court of Appeal held that the five-year completion requirement of ORS 537.230(1) applied to municipalities and that issuance for a permit to a municipality that would not apply water to beneficial use until more than 10 years violated the statute. *WaterWatch of Oregon, Inc. v. Water Resources Commission*, 193 Or App 87, 107, 113 (2004). The Oregon Supreme Court granted the municipality's petition for review, but in 2005 the Oregon legislature amended the statute to extend to 20 years the time in which a municipality must put water to beneficial use. See ORS 537.230(2). The legislature's enactment also provided that all final orders of the Department that resulted in the issuance of a water right permit or certificate or the approval of an extension of time to complete construction or to perfect a water right for a municipal use that were issued before the effective date of the act are not subject to challenge with respect to the requirement to commence and complete construction within a specified period of time. *WaterWatch v. Water Resources Commission*, 339 Or 275, 278 (2005). As a result of the enactment, the Supreme Court vacated the court of appeal decision and remanded the case for further consideration. *Id.* at 279; see also *Tarlock* at n. 75; Michelle Henrie, *Oregon's Municipalities Can Take the Time They Need to Grow*, 7 Water Resources IMPACT 12 (Nov. 2005).

The legislature amended ORS 537.230 to extend the five-year completion time only for "[t]he holder of a permit for municipal use." The legislature did not extend the time for quasi-municipal uses. The latter uses are still subject to the five-year completion period under ORS 537.230(1).

Under ORS 537.410(1), the Department may cancel a permit:

[w]henver the owner of a permit to appropriate the public waters of Oregon fails

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(1) Except for a holder of a permit for municipal use, the holder of a water right permit shall prosecute the construction of any proposed irrigation or other work with reasonable diligence and complete the construction within a reasonable time, as fixed in the permit by the Water Resources Department, not to exceed five years from the date of approval.

(2) The holder of a permit for municipal use shall commence and complete the construction of any proposed works within 20 years from the date on which a permit for municipal use is issued under ORS 537.211. The construction must proceed with reasonable diligence and be completed within the time specified in the permit, not to exceed 20 years. However, the department may order and allow an extension of time to complete construction or to perfect a water right beyond the time specified in the permit under the following conditions:

\* \* \* \* \*

(3) Except as provided in ORS 537.240 and 537.248 and subsection (2) of this section, the Water Resources Department, for good cause shown, shall order and allow an extension of time, including an extension beyond the five-year limit established in subsection (1) of this section within which irrigation or other works shall be completed or the right perfected. In determining the extension, the department shall give due weight to the considerations described under ORS 539.010 (5) and to whether other governmental requirements relating to the project have significantly delayed completion of construction or perfection of the right.

to commence actual construction work within the time required by law, or having commenced construction work as required by law, fails or neglects to prosecute the construction work with reasonable diligence, or fails to complete the construction work within the time required by law, or as fixed in the permit, or within such further time as may be allowed under ORS 537.230, or having completed construction work, fails or neglects to apply the water to beneficial use within the time fixed in the permit[.]

Permits issued “to municipal corporations for municipal uses \* \* \*are not subject to cancellation under the provisions of ORS 537.410 to 537.450.” There is no exemption to this requirement for permits issued to private companies for quasi-municipal uses.

Before the hearing of this case, the Company moved for summary determination of WaterWatch’s contention that the Company “has not shown an ability or intent to complete this project within five years under ORS 537.230(1).” I granted the motion and dismissed this contention on the grounds that “ORS 537.230(1) relates to permit extensions, not to permit applications”; “[n]o statute or regulation requires a permit applicant to prove an ability or intent to complete the project within five years”; and the Company offered evidence that it intended “to commence construction of such facilities and active delivery of water to the area to be served by [the Company] within one year” from permit issuance. Rulings on Willamette Water Company’s Motions for Summary Determination at 9.

Although the Application was not defective for lack of a showing of the Company’s ability or intent to complete the project within five years, nevertheless, evidence of the Company’s inability to make actual beneficial use of the requested amount of water within the statutory period is relevant to the issue of whether the Application proposed actual beneficial use. At the hearing, the evidence established that although the Company may be able to begin construction within five years, decades would be needed before the full need for 34 cfs would materialize and before the Company could complete construction. Because the Company is not a municipality, it is not exempt from the five-year limitation under ORS 537.230(1) and the cancellation provisions of ORS 537.410(1) for failure to complete construction within the statutory period.

Although the Department may grant extensions for good cause under ORS 537.230(3), the Department effectively treats the Company as a municipality by granting the permit while knowing the Company cannot develop use of 34 cfs without indefinite extensions of the completion period several decades into the future. The statutes and regulations do not authorize the Department to do so.

To justify issuing the permit, the Department considered that the Company could supply water to regions outside the PSA, under the exception for municipalities to the rule that water must be used on lands to which the water right is appurtenant. ORS 540.510(1) provides, in part:

Except as provided in subsections (2) to (8) of this section, all water used in this state for any purpose shall remain appurtenant to the premises upon which it is used and no change in use or place of use of any water for any purpose may be

made without compliance with the provisions of ORS 540.520 and 540.530. However, the holder of any water use subject to transfer may, upon compliance with the provisions of ORS 540.520 and 540.530, change the use and place of use, the point of diversion or the use theretofore made of the water in all cases without losing priority of the right theretofore established.

ORS 540.510(3) provides an exception to the appurtenance rule for permits issued to municipalities:

(a) Any water used under a permit or certificate issued to a municipality, or under rights conferred by ORS 538.410 to 538.450, or under the registration system set forth in ORS 537.132, may be applied to beneficial use on lands to which the right is not appurtenant if:

(A) The water is applied to lands which are acquired by annexation or through merger, consolidation or formation of a water authority, \* \* \* ;

(B) The use continues to be for municipal purposes and would not interfere with or impair prior vested water rights; or

(C) The use is authorized under a permit granted under ORS 468B.050 or 468B.053 \* \* \*.

(b) As used in this subsection, "municipality" means a city, a port \* \* \*, a domestic water supply district \* \* \*, a water supplier as defined in ORS 448.115 or a water authority \* \* \*.

ORS 448.115 provides, in part:

As used in ORS 448.115 to 448.285, 454.235 and 454.255 unless the context requires otherwise:

\* \* \* \* \*

(12) "Water supplier" means any person, group of persons, municipality, district, corporation or entity that owns or operates a water system.

(13) "Water system" means a system for the provision of water for human consumption through pipes or other constructed conveyances.

At the hearing, the Department asserted that under ORS 540.510(3)(b) and 448.115(12), the Company qualified for the exception for municipalities to the appurtenance requirement. In its post-hearing brief, the Department conceded that the exception under ORS 540.510(3) was not applicable to the Company because OAR 690-300-0010(40) provides that "[a] quasi-municipal water right shall not be granted the statutory municipal preferences given to a municipality under ORS \* \* \*540.510(3)[.]" Nevertheless, the Department maintained that it could still properly consider other communities the Company may serve

within a 75-square-mile footprint of lands contiguous to the communities listed when it assessed demand for the water. Notwithstanding the application of ORS 540.510 to a quasi-municipal permit holder, any permit holder may change the place of water use described in a permit. ORS 537.211. Although the department may have envisioned that no administrative action would be needed to implement a change in place of use, it did not wrongly consider that such changes could be made to accommodate demand within a 75-square mile footprint that includes the communities listed in the application. The text of ORS 537.153(3)(c) makes clear that the department is to assess the necessity of the proposed use as opposed to considering the administrative contingencies presented by the use. ORS 174.010. In this case, the proposed use is quasi-municipal, and in the southern Willamette Valley, demand for this water outstrips supply regardless of the administrative actions [the Company] may need to accomplish delivery.

Department's Response to WaterWatch's Closing Arguments at 8 to 9.<sup>21</sup>

The Department's argument confirms the speculative nature of the proposed permit. It suggests unspecified "changes [that] could be made to accommodate" unspecific demand within unspecific areas in the 75-square mile footprint. It also glosses over the land-use compatibility requirements that must be established before a permit can be issued, as discussed above.

As the Department argued, cities do not know if businesses or people will come into their regions, but they want to be prepared for a building boom or for water-intensive businesses that may want to locate into the area. No Oregon city wants to issue a growth moratorium based on having insufficient water, so cities plan to have enough water for the coming 20 to 50 years. The Department has the responsibility to encourage regional water planning and coordination, and it reasonably seeks to provide water supply options for municipalities through the water permitting process. The Department considers that its authority—to issue a permit and to cancel it a few years later for failure to make beneficial use—is a safeguard against overappropriation.

Nevertheless, the anti-speculation doctrine embodied in the concept of actual beneficial use without waste prevents the Department from extending to private entities the preferences and exemptions from the doctrine that municipalities enjoy. The legislature and the Department's rules have not extended such preferences and exemptions to quasi-municipal entities.

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<sup>21</sup> ORS 537.211(4) provides in part that:

a holder of a water right permit may change the point of diversion, change the point of appropriation, \* \* \* or use the water on land to which the right is not appurtenant" under limited circumstances, including that "(b) For a proposed change in the place of use of the water, the land on which the water is to be used is owned or controlled by the holder of the permit and is contiguous to the land to which the permit is appurtenant[.]



## *Conclusion*

Compliance with the Department's rules is one of the criteria for establishing the public interest presumption under ORS 537.153(2). The preponderance of the evidence established that the Application failed to comply with the Department's rules for compliance with land use plans. OAR 690-005-0035 and 690-410-0070(2)(i). Therefore, the public interest presumption has been overcome. ORS 537.153(2)(a).

The preponderance of the evidence established that the Application proposed a speculative use for more water than the Company could establish it could put to actual beneficial use within the time allowed under ORS 537.230(1). Therefore, the granting the permit would impair or be detrimental to the public interest under ORS 537.153(2)(b), because the Application did not propose a beneficial use under ORS 537.170(8)(a).

## **PROPOSED ORDER**

I propose the Department issue the following order:

Application No. S-87330, for a permit to appropriate 34 cfs of water from the McKenzie River, is denied.

/s/ Jim Han

Administrative Law Judge  
Office of Administrative Hearings

## **NOTICE**

This Proposed Order is issued by the administrative law judge pursuant to OAR 137-003-0645. As provided in ORS 537.173, OAR 37-003-0650 and OAR 690-002-0175, any party to this proceeding or the Department may file exceptions to this proposed order with the Oregon Water Resources Commission. The exceptions must be in writing and received at the Water Resources Department no later than 20 days after the date of service (the date served according to the certificate of service) of this proposed order. You should also send a copy of your exceptions to any other party or parties to the contested case hearing. Send any exceptions to:

Oregon Water Resources Department  
C/o Renee Moulun  
725 Summer Street, NE Suite "A"  
Salem, OR 97301

Exceptions are legal or factual arguments illustrating legal or factual error in the proposed order, as demonstrated by the record. Evidence not in the record may not be offered in exceptions. Exceptions must clearly and concisely identify the portion(s) of the proposed order excepted to,

and cite to appropriate portions of the record or Commission policies to which modifications are sought in the exceptions.

If exceptions are filed, any party or the Department may respond to the exceptions. The Department must receive responses no later than 10 days after the date of service of the exceptions. An opportunity may be provided for making additional written or oral argument to the Commission, at the Commission's determination and discretion. After reviewing the record, the exceptions and any additional argument, the Commission will issue a final order. The Commission may issue a final order that differs from the proposed order or it may adopt the proposed order as the final order.

If exceptions are not filed within the allowed period, the Director will issue a final order.

## CERTIFICATE OF SERVICE

On 27<sup>th</sup> day of April 2012, I mailed the foregoing **PROPOSED ORDER** in Reference No. **WR-10-003** by depositing a copy of said document in the U.S. Post Office at Salem, Oregon 97309, with first class postage prepaid thereon, and addressed to:

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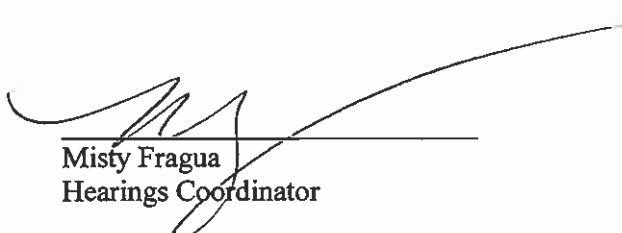
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